(1)

SUPREME COURT, U.S.
FILED

99 6160CT 8 1999

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GAIL S. WILLARS
Petitioner

v.

JONES, WARDEN

LA. CORRECTIONAL

INSTITUTE FOR WOMEN
Respondent

Petition for Writ of Certiorari
To The 5th Circuit Court of Appeal

Arax "Renee" Brumfield
Counsel of Record
Brumfield & Brumfield
4560 Inniswold
Baton Rouge, Louisiana 70809
(225) 292-6151
(225) 292-6150 (fax)

43?

I. QUESTIONS PRESENTED

1. Did the Court of Appeal err when it failed to grant Petitioner's certificate of appealability.

2. Did the Court of Appeal err when it decided that Petitioner failed to show substantial denial of a Federal Right (i.e. Constitutional Right).

II. LIST OF PARTIES

1. Gail S. Willars

2. Mr. Richard P. Ieyoub, Department of Justice, the State of Louisiana.

3. Warden, La. Correctional Institute for Women

III. TABLE OF CONTENTS

QUESTIONS PRESESNTED. 1

LIST OF PARTIES 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

OPINIONS BELOW 7

JURISDICTION 9

STATUTES & CONSTITUTIONAL PROVISIONS 10

STATEMENT OF THE CASE 18

REASONS FOR GRANTING WRIT 26

CONCLUSION 43

The appendix is filed as a separate document

IV. TABLE OF AUTHORITIES

		Pages
1.	U. S. Constitution, Article III, Section 2	10
2.	U.S. Constitution, Amendment V	10
3.	U.S. Constitution, Amendment VI	11,30,32
4.	U.S. Constitution, Amendment XIV	11, 32
5.	28 U.S.C. 1253	12, 25
6.	28 U.S.C. 1254(1)	12
7.	28 U.S.C. 2254	8,9,11,26
8.	La. Constitution, Article 1, Section 16	14
9.	La. C.Cr.P. Art. 701	15,34,36
10.	La. C.Cr.P. Art 704	15
11.	La. R.S. 14:64 & 14:64.1	15, 39
12.	La. R.S. 14:65	17
13.	La. R.S. 15:438	17
14.	La. R.S. 14:30, 14:30.1 & 14:31	13
15.	Barker v. Wingo 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed 2d 101 (1972)	38
16.	Bates v. Blackburn, 805 F.2d 568 (5th Cir 1986)	30
17.	Cage v. Winship, 498 U.S. 39, 111 S.Ct. 328 (1990) (per curiam)	41

18. Chambers v. Armontrout, 805 F.2d 1318 32

19. Gray v. Lynn (5th Cir. 10/20/93) 6 F.3d 265 32

20. Hohn v. United States (S.Ct. 1998) 524 U.S. 236 9

21. Humphrey III v. Cain, (5th Cir April 3, 1998), 120 F.2d 326, 138 F.3d 552. 40

22. Johnson v. Estelle, (5th Cir 1983)704 F.2d 232 , No. 82-2033 29

23. Maddox v. Lord, 818 F.2d 1058 32

24. Murphy v. Johnson, 110 F.3d 10, 1(5th Cir. 1997)27

25. Robins v. Smith, 125 F.2d 831 (9th Cir 1997) 29

26. State v. Beauchamp, (La. App 1st Cir 1987), 37, 38 510 So. 2d 22, writ denied, 512 So. 2d 1176 (La. 1987)

24. State v. Walter Cowger, (5th Cir March 13, 1991),38

25. State v. Johnson, (La. 1978), 463 So2d 458. 29

26. State v. McGraw, (La. 1978), 366 So.2d 1278, at 1283 36

27. State v. Pleasant, (La. App 1st Cir 1986), 489 So.2d 100, writs denied, 493 So.2d 1218 (1986) 37

28. State v. Potter, 92-K-2552 (La. App 4th Cir 1/4/93), 612 So.2d 953.Writs denied 619 So.2d 574 (1993).32

29. State v. Prudholm, (La. App Jan 16, 1984), 446 So.2d 729 35

30. State v. Sosa, (La. App. 4th Cir 1984), 446 So. 2d 429, writ denied, 469 U.S. 866, 105 S.Ct. 209. 37

31. Strickland v. Washington, 466 U.S. 2052 (1984) 29

32. State v. Turner, (La. App, Dec 15, 1978), 365 So.35 2d 1352 writ denied 493 So. 2d 1218 (La. 1986)

33. U.S. v. Haese, 97-10307 (5th Cir. 1999) 29,40

34. Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239 (1994) 41

35. In Re Winship, (S.Ct. 1970), 397 U.S. 358, 90 S.Ct. 1068 41

ON PETITION FOR WRIT OF CERTIORARI
To The 5th Circuit Court of Appeal

The Petitioner, Gail S. Willars, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals, Fifth Circuit on April 6, 1999, rehearing denied July 12, 1999).

V. OPINIONS BELOW

August 14, 1991	Willars was convicted of 2nd Degree Murder on the 17th day of February, 1991 and sentenced to mandatory Life in Prison without benefit of probation or parole Aug. 14, 1991 in State of Louisiana vs. James Crandall and Gail Willars, Docket No. 68,208, 26th Judicial District, Bossier Parish, La.
August 11, 1994	Petition for Post Conviction Relief was filed in the Bossier Parish. The Petition was granted for purpose of allowing an out of time appeal. No hearing was allowed.
September 27, 1995	Conviction affirmed in the La. 2nd Circuit Court of Appeals, Docket No. KA/94/27394. State of Louisiana, vs. Gail Willars, (La.App. 2 Cir. 9/27/95); 661 So.2d 673
March 29, 1996	Writs denied in the La. Supreme Court. State of Louisiana vs. Gail Sue Willars, (La.S.Ct. 1995), Appeal No. 95 K 2825,

May 3, 1996	Motion for Rehearing from the Louisiana Supreme Court was denied.
December 12, 1996	A second Petition for Post Conviction Relief was filed in the 26th Judicial District Court. (issues same as 1st Petition.) It was denied on the 19th of December as being repetitive. "ORDER" This application is repetitive and devoid of merit. It is denied. S/ Judge Drew. *(all issues presented had already been decided by La. Court of Appeals and Supreme Court.
March 26, 1997	Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 – State Custody was filed in the United States District Court, Middle District of Louisiana and transferred to the Western District of La. As case no. 97-0693.
September 4, 1998	Petition for Writ of Habeas Corpus denied.
September 8, 1998	Judgment entered, denying Petition for Writ of Habeas Corpus
September 18, 1998	A Notice of Appeal to the 5th Circuit Court of Appeal was timely filed.
October 1, 1998	Judge Stagg, U.S. District Court, Western District of Louisiana, denied Certificate of Appealability because "the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right"
October 12, 1998	Petition to Certify Appealability was filed with the 5th Circuit Court of Appeals

April 6, 1999	Certificate of Appealability was denied by the 5th Circuit Court of Appeals
July 12, 1999	Petition for Rehearing was denied

VI. JURISDICTION

Willars filed a Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 on March 27, 1997 in the U.S. District Court, Middle District of Louisiana, Suit No. 97-236-A,(transferred to Western District of Louisiana, No. 97-0693)seeking relief from a conviction in the 26th Judicial District Court, Bossier Parish, Louisiana. State remedies were exhausted. The Petition was denied and a timely appeal was filed to the 5th Circuit Court of Appeal, Docket No. 97-31043. Certificate of Appealability was denied by the district court judge.

An application for Certificate of Appealability was filed by Willars on October 12, 1998 to the 5th Circuit Court of Appeals. Certificate of Appealability was denied on April 6, 1999 and rehearing was denied on July 12, 1999.

The United States Supreme Court has jurisdiction under 28 U.S.C. 1254(1) to review denials of applications of Certificates of Appealability by a circuit judge or a court of appeals panel, Hohn v. United States, (S.Ct. 1998) 524 U.S. 236.

VII. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 2 *Judicial power; to what cases it extends*... 1. The judicial power shall extend to all cases, in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; ..."

U. S. Constitution, Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

28 U.S.C. § 2254. State custody; remedies in Federal courts. (a) The Supreme Court, a Justice thereof, a circuit

judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States...

28 U.S.C. 1254(1) Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1)By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

2 8 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a

State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Louisiana Constitution, Art. 1, Sec. 16

16. Right to a Fair Trial

Section 16. Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf. However, nothing in this Section or any other section of this constitution shall prohibit the legislature from enacting a law to require a trial

court to instruct a jury in a criminal trial that the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime that the governor in exercising such authority may commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole, may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole, or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon.

La. C.Cr.P. Art 701. A. The state and the defendant have the right to a speedy trial...

D. (1) A motion by the defendant for a speedy trial, in order to be valid, must be accompanied by an affidavit by defendant's counsel certifying that the defendant and his counsel are prepared to proceed to trial within the delays set forth in this Article. After the filing of a motion for a speedy trial by the defendant and his counsel the time period for commencement of trial shall be as follows:

(a) The trial of a defendant charged with a felony shall commence within one hundred twenty days if he is continued in custody and within one hundred eighty days if he is not continued in custody.

(2) Failure to commence trial within the time periods provided above shall result in the release of the defendant without bail or in the discharge of the bail obligation, if after contradictory hearing with the district attorney, just cause for the delay is not shown.

E. "Just cause" as used in this Article shall include any grounds beyond the control of the State or the Court.

F. A motion for a speedy trial filed by the defendant, but not verified by the affidavit of his counsel, shall be set for contradictory hearing within thirty days.

La. C.Cr.P. Art. 704. Severance

Jointly indicted defendants shall be tried jointly unless:

(1) The state elects to try them separately; or

(2) The court, on motion of the defendant, and after contradictory hearing with the district attorney, is satisfied that justice requires a severance.

La. R.S. 14:64. Armed robbery

A. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

La. R.S. 14:65. Simple robbery

A. Simple robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon.

La. R.S. 15:438. Circumstantial

The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.

La. R.S. 14:30 First Degree Murder

A. First degree murder is the killing of a human being (1) when the offender has specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted

perpetration of aggravated kidnapping, second degree kidnapping, ... armed robbery, ... first degree robbery, or simple robbery.

La. R.S. 14:30.1 Second Degree Murder

A. Second degree murder is the killing of a human being (1) When the offender has a specific intent to kill or to inflict great bodily harm; or (2)(1) When the offender is engaged in the perpetration or attempted perpetration of ... second degree kidnapping,..armed robbery, first degree robbery or simple robbery, even though he has no intent to kill or inflict great bodily harm...

La. R.S. 14:31 Manslaughter

...(2) A homicide committed, without any intent to cause death or great bodily harm (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not numerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person;

VIII. STATEMENT OF CASE

Gail Willars was convicted of 2nd degree murder in connection with the death of Charles Parr on the 20th of August, 1989. James Crandell, Willars' co-defendant was tried with her and was convicted of 1st degree murder. Both were sentenced to life in prison without benefit of probation or parole.

Gail Willars' testimony at trial revealed the following tragic sequence of events. During the summer of 1989, Willars, her eight year old son, Zachary and James Crandell migrated to Bossier City, Louisiana and temporarily resided at the Beacon Manor Motel. Willars received a monthly insurance check the first of each month. Towards the end of August, 1989, the trio ran short of funds to cover rent. Eviction was imminent.

Willars' co-defendant, James Crandall demanded Willars prostitute herself to raise funds. After her father refused to send her an advance, Willars agreed to prostitute herself.

On the August 20, 1989, Willars instructed Crandell and her son to leave the room while she took care of her business. Ignoring Willars' instructions, Crandall and Zachary hid in the bathroom.

Willars met Parr outside the motel, made monetary arrangements, and agreed that Gail would perform oral sex. Once inside the room, Parr became abusive when Gail refused to do more than oral sex. He picked her up by the shoulders and lifted her off the ground.

Crandell jumped out of the bathroom and began fighting with Parr. After a struggle, Crandall subdued him, taped his mouth and shoved him into the closet. Parr freed himself and the two men continued to fight. Crandall hit Parr in the head with a frying pan several times and stuffed him back into the closet.

Believing Parr to be gravely injured, Willars attempted to help him. Crandell ordered Willars to leave Parr alone. She was told Parr was dead and there was nothing she could do for him.

Crandall ordered Willars to clean the room and check out of the motel. Willars obeyed to protect her son. Crandall would not allow Zachary out of his sight. Gail was reasonable to believe that she and her young son were in danger and one wrong move on her part could result in the death of her son.

The trio fled to Chicago in Parr's vehicle. Shortly after their arrival, Willars and Crandall were arrested, transported to Louisiana and charged with first degree murder.

On April 10, 1990, Willars' court appointed attorney, Robert Raley requested that the trials of Willars and Crandell be severed. Judge Kitchens denied Raley's request the following day.

During the trial, Crandell filed a Motion in Limine. Because the two were being tried together, Willers was limited in developing her strongest defense, the abusive nature of Crandell. The court, in its ruling stated:

> Page 936, line 13 of the record
>
> THE COURT: All right. So noted, counsel. Then just for the clarity Madam Clerk, on the Motion in Limine filed on behalf of Mr. Crandell today, while I am instructing Mr. Raley not to seek to elicit testimony from his client merely for the purpose of showing the alleged bad character of Mr. Crandell, I will allow him to elicit the testimony from his client in explaining her situation and explaining her side of the case. So I will deny this request to limit the testimony extended by Mr. Stinson..... And for one thing, the remedy in a situation like this normally would be a severance. Short of severance, which I don't think either defendant wants, short of severance, I don't know what else to do but allow her to tell the story. And I will give the—appropriate limiting and cautionary instructions later..."

Willars was denied a severance by Judge Kitchens; however, Judge Drew ruled that she should have requested a severance.

Margie Theodos, part owner of the Beacon Manor Motel testified that Gail Willars, Zachary Willars and James Crandell stayed in Room 15 of the Beacon Manor Motel for part of July and most of August, 1989 under the name of Mr. and Mrs. James Crandell. Room 15 was a large room with mirrors everywhere, a kitchenette and an adjoining bathroom. Theodos gave Willars by 10:00 a.m. August 21, 1989 to pay the rent or move.

The second witness, George McCormick, Coroner of Caddo Parish and Deputy Coroner of Bossier Parish testified that Mr. Parr suffered multiple injuries consistent predominately with blows by a blunt instrument. He found abrasions and scraping of the skin on the knees, bruises on the ankles and areas of blanching or whitening of skin around the wrist consistent with having been bound. Parr suffered severe head trauma. McCormick testified that bruises on the victim were consistent with dragging and many wounds appeared to be defensive wounds consistent with an

altercation. This testimony was in direct conflict with Zachary's testimony denying an altercation.

Ms. Alder, the sixth witness testified that Crandell, Willars and Zachary traveled to her house after Crandell killed Parr. She made the following inculpatory statements.

Page 1068, Line 10

Q. Now, pertaining to their coming to Chicago, what did they tell you?

A. They both at separate times said they had to come to Chicago to leave Gail's son Zachary with my husband and I because they had to kill a man and were running from the law."

This statement had been suppressed the morning of the jury selection, yet Bullers asked a question he new would result in the suppressed testimony and Raley failed to object.

Mr. Bullers, the Assistant District Attorney had amended his response to discovery on the 1st day of Jury selection (February 12, 1991) giving notice that Ms. Alders would recount inculpatory statements made by both defendants. Counsel for Defendant objected to those statements being made at trial and the Judge signed an order suppressing the statements of both Ms.

Alders and Ms. Page on the 13th of February 1991 (prior to Ms. Alders testimony).

Zachary denied Parr struggled with Crandall. He testified Willars handed Crandall the frying pan used to kill Parr.

Willars vehemently denied handing Crandell the murder weapon (the frying pan). Zachary's testimony that "Mom handed him the frying pan" was the most damning testimony of the trial..

Prior to Zachary's testimony, a cursory competence hearing out of the presence of the jury was held by Judge Drew. This "hearing" was a sham. This hearing was held without the benefit of the psychiatric records in the possession of Robert Raley, Gail Willars' attorney. The psychiatric documents demonstrate without a doubt that Zachary was not competent to testify and had a propensity to lie.

The court ruled that Zachary was competent to testify, noting that:

> p. 1082 line 6
>
> The Court: All right, counsel, cases under the evidence code indicate the court has wide discretion. Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that he is an intelligent child, and I think considering his age, I certainly think he is

competent to testify and I will so rule at this time, noting error being assigned by both counsel."

The transcript showed not only that Zachary was coached, but that Zachary was coached during testimony. Joan Carraway, Clerk of Court testified that she observed Zachary talking to someone in the audience while he was on the stand. Joan Carraway had no reason to make up this allegation.

Without the psychiatric reports from Charter Hospital, Willars had no way to prove that Zachary failed kindergarten, that Zachary was in special education, that Zachary blamed his mother for the death of his father, that Zachary had severe emotional problems effecting the way he perceived things or that Zachary had problems with relating events accurately.

Even though Raley had the Charter Hospital Records in his possession, he never introduced them at the trial, either for the purpose of determining Zachary's competency or for credibility purposes.

James Crandell declined to testify; however, letters written by Crandell were introduced into evidence without objection, denying Gail's involvement in the murder.

All Constitutional issues argued in this writ were first presented to the 26th Judicial District Court, State of La. In Petition for Post Conviction Relief on the 15th of August, 1994. The Honorable Judge Drew granted an out of time appeal only. All issues were presented to the 2nd Circuit Court of Appeal, State of Louisiana and the Supreme Court. See page 25 of appendix for Court of Appeal decision and page 54 denial of Supreme Court Writ . The issues were presented by Petition for Habeas Corpus to the U.S. District Court, Western District of Louisiana and denied. See p. 55, Excerpts from Petition for Writ of Habeas Corpus, p. 71, Excerpts from Brief in Support of Writ of Habeas Corpus, p. 82 for Report and Recommendation of Magistrate and p. 107 for Judgment of District court. A Motion for Certificate of Appealability to the 5th Circuit was denied. P. 151, rehearing denied, p. 154.

IX. REASONS FOR GRANTING WRIT

The court erred in refusing to grant Willars' Motion to Certify Appealability. *(Question presented 2)*

28 U.S.C. § 2254 provides for State custody remedies in Federal Courts on Petition for Writ of Habeas Corpus on the ground that the person is in custody in violation of Constitutional Laws or treaties of the United States

Willars filed a Petition for Writ of Habeas Corpus in Federal court alleging a number of Constitutional violations. There was complete exhaustion of State Court Remedies on the issues presented to the Judge for Habeas Corpus relief. Judge Stagg ruled adversely to Willars.

An appeal of a denial of a Petition for Habeas Corpus of a state court conviction may be taken to the U.S. Court of Appeals, however, 28.U.S.C. 2253 provides a Certificate of Appealability must be granted. A Certificate of Appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

Standards for granting a Certificate of Appealability were addressed in Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997) as being the same as the old Certificate of Probable Cause. The court engaged in a two-step process. The court must first decide if there has been a credible showing of exhaustion; then it must decide if the underlying claim is debatable among reasonable jurists. Only if the answer to the second question is in the affirmative has there been a substantial showing of the denial of a constitutional right. Both steps were met in the Willars case.

Unlike Willars, Murphy contained both exhausted claims and unexhausted claims[1]. The court ruled:

> Therefore, he has failed to satisfy the exhaustion requirement and, accordingly, is not entitled to a COA.

[1] Magistrate Payne sent notice to appellant that her petition contained both exhausted and unexhausted claims. He ordered Petitioner to dismiss the unexhausted claims or the entire Petition would be dismissed. Petitioner voluntarily dismissed the claims Magistrate listed as unexhausted.

SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHTS

(Question Presented 2)

Serious violations of constitutional rights were committed in the Willars case. Any one error was severe enough to change the outcome of the verdict. A combination of these errors assured that Willars would be convicted of second-degree murder and sentenced to life behind bars.

As will be shown in the cited cases, the Louisiana Supreme Court denied writs on a 2nd Circuit Court of Appeals decision which was contrary to the United States Constitution and in contravention of U.S. Supreme Court decisions and Court of Appeals decisions.

As to effective assistance of counsel, the 9th Circuit Court of Appeals and 5th Circuit Court of appeals take contrary positions on the issue as to whether or not it is error for a district court to grant an out of time appeal without holding an evidentiary hearing to decide a claim of ineffective assistance of counsel.

Effective Assistance of Counsel

Willars argued at all stages of the state court proceedings that she was denied effective assistance of counsel as required by the 6th and 14th Amendment to the United States Constitution. Denial of effective assistance of counsel was properly pled in the Habeas Corpus Proceeding.

Ineffective assistance of counsel is generally litigated in state post conviction relief or Federal Habeas Corpus. Facts constituting ineffective assistance of counsel are established at hearings on post conviction relief. The 9th Circuit in Robin v. Smith (9th Cir 1997) 125 F.3d 831 held it to be error for a district court to grant an out of time appeal without conducting a hearing on the issue of ineffective assistance of counsel. The 5th Circuit held the opposite in U.S. v. Hess, (5th Cir 1999), Docket No. 97-10307.

The United States Supreme Court set the standard for establishing ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 2052 (1984) by establishing a two prong test.

The defendant must first show that counsel's performance was defective; that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution.

The 5th Circuit in Johnson v. Estelle, 704 F.2d 232, No. 82-2033, 1983 added the requirement that "but for counsel's unprofessional errors, the result of the proceeding would be different. Bates v. Blackburn, (5th Cir 1986) 805 F. 2d 569.

The state court of appeals acknowledged that the first prong of the two-prong test was meet by Robert Raley's failure to object to Ms. Alders' testimony concerning any "admissions" Willars may have made p. 40 and 41 of the appendix. Other errors made by Raley either by themselves or in connection with other errors met the first prong of the test, namely, failure to submit the records from Charter Hospital, failure to call witnesses, cross examining Willars' young son and leading him into testifying against her interests, and failure to insist upon severance.

One of the most serious errors was her attorney's failure to submit psychological records of Zachary. Quotations from

psychological reports are on pages 73-78 of the Appendix. The quotations demonstrate Zachary's severe emotional problems, limited mental abilities and propensity to deviate from the truth. These records were submitted in the State Court Petition for Post Conviction relief, on direct appeal to both the Court of Appeals and the Supreme Court and on the U.S. District Court Petition for Habeas Corpus.

Dr. Sue Williams noted Zachary to have a full scale IQ of 71 (borderline intelligence), p. 73 of the appendix. She stated on page 74 that "It is my impression that Zachary may be capable of functioning at least in the dull average range were it not for his disturbances." On page 77 of the appendix, a Psychiatric Evaluation compiled by Dr. Van Dyke Degola, M.D. Documented the following behaviors...F. Psychosis (2) Delusional/grandiosity...(7) lying.

The second prong of the two-prong test set out in Strickland, supra was that the defendant must show that the deficient performance prejudiced the defense. Clearly, the errors made by counsel guaranteed that Willars would be unjustly convicted of 2nd Degree Murder.

The 4th Circuit in State v. Potter, 92-K-2552 (La. App. 4th Cir, 1993), 612 So.2d 953 held failure to interview and subpoena witnesses who would have corroborated defendant's theory of self-defense and failure to argue manslaughter as a responsive verdict ineffective assistance of counsel. Failure to call and interview witnesses was also found to be ineffective assistance of counsel by the 8th Circuit in Chambers v. Armontrout, (8th Cir 1989), 885 F.2d 1318. The court in Maddox v. Lord, (2nd Cir. 1987) 818 F.2d 1058 found failure to present witnesses and failure to show emotional problems of defendant deficient. Failure to object was found to be deficient in Gray v. Lynn, (5th Cir 1993), 6 F.3d 265.

Willars easily met the two-prong test set forth in the cases in violation of the 6th and 14th Amendments to the United States Constitution. But for the errors, Willars would not have been convicted of 2nd degree murder.

RIGHT TO CONFRONTATION

Willars' Constitutional Right to Confrontation was violated when the judge did not allow the defense counsel the opportunity to cross-examine Zachary Willars at the competency

hearing; even though he offered the District Attorney the opportunity to ask questions. This error cannot be considered harmless when you consider the fact that Zachary believed his mother had killed his father, Zachary' limited mental and emotional capacity and the fact that Zachary was dysfunctional.

The court was initially going to allow both Prosecution and Defense to question Zachary on the issue of competency, but after Bullers declined, Willars' attorney was not give the opportunity to question Zachary.

p. 1078 of trial transcript, line 2

"THE COURT: American Airline? Okay, The—do any of the attorneys desire to ask the witness any questions?

MR. BULLERS: Your honor, I think it would be appropriate for the court to handle that. I think that would be the best procedure.

THE COURT: The—do any of the defense lawyers feel they should be allowed to ask the witnesses any questions? I think this is a determination for the court. Is there anything – lets put it this way, is there anything that defense counsel would like me to go into?"

The court proceeded to question Zachary some more on the areas that concerned Robert Raley, but that is not the same as Robert Raley being able to examine the witness himself. The court ruled on Zachary's competence as follows:

THE COURT: All right counsel, Cases under the Evidence Code indicate the Court has a wide discretion. Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that the child is an intelligent child, and I think considering his age, I certainly think he's competent to testify, and I will so rule at this time, noting error being assigned by both counsel.

Several persons, including Joan Carraway, Clerk of Court observed Zachary communicating with someone in the audience while testifying. Mr. Evens, one of Gail's attorneys and observers in the courtroom also thought Zachary was communicating with someone in the courtroom. P.66 appendix.

REFUSAL TO SEVER
DENIAL OF DUE PROCESS

Due to the conflicting nature of Willars' and Crandall's defense, it was error not to sever the trials of Willars and Crandall. Willars was Crandall's defense and Crandall was Willars' defense. Willars was limited on testimony she could give concerning Crandall's character. Character evidence (particularly evidence concerning Crandall's violent nature and his control over people) was essential to her defense and could have been presented had they not been tried together. La. C.Cr.P. Art 701, see Statutes and Constitutional Provisions.

Normally, co-defendants are tried together; however, circumstances often exist where it is essential that defendants be tried separately. The various cases refer to severance being necessary when the defendants have mutually antagonistic defenses. This would cause the defendant to defend the charges brought by the state and the charges brought by the co-defendant. As always, the need for severance depends on the facts of each case. State v. Prudholm, 446 So.2d 729 (La., Jan 16, 1984) State v. Turner, 365 So.2d 1352 (La. Dec 15, 1978)

The minutes of the court reflect the following:

1. 4/11/90 Defendant Willars is in open court with Counsel Robert Raley, Motion is called. State will not sever cases and will not call case for trial Monday, April 16, 1990. Case is continued to be reset by notice (Kitchens)

2 Honorable Judge Harmon Drew later ruled

p. 9, line 13 THE COURT...Then just for clarity, Madam Clerk, on the Motion in Limine filed on behalf of Mr. Crandall today, while I was instructing Mr. Raley not to seek to elicit testimony from his client merely for the purpose of showing the alleged bad character of Mr. Crandall, I will allow him to elicit the testimony from his client in explaining her situation and explaining her side of the case. So I will deny the request to limit the testimony extended by Mr. Stinson. I'll note that he assigns error to the Court's ruling. And my reasons for my ruling are—contained in the short memo that's attached to the outside of the envelope. And for one thing, the remedy in a situation like this normally would

be a severance. Short of a severance, which I don't think either defendant wants, short of a severance, I don't know what else to do but allow her to tell the story. And I will give –the appropriate limiting and cautionary instructions later…"

The decision of Judge Kitchens not to sever and the ruling that short of severance, this problem could not be cured resulted in a decision which was exercised arbitrarily or to the prejudice of the accused State v. McGraw, 366 So. 2d 1278 (La. 1978) at 1283. The decision not to sever the trial denied Willars the opportunity to present critical evidence in her defense.

SPEEDY TRIAL

Willars was denied her Constitutional Right to a speedy trial. One of the reasons Willars sought a severance was because the trial was constantly being continued due to the actions of James Crandall. Additionally, her case was put on hold while Robert Raley and Jim Bullers ran for office. Jim Bullers ran for District Attorney and Robert Raley ran for judge on a "get tough on crime campaign."

The two bases for defendant's right to a speedy trial are contained in La. C.Cr.P. Art 701, Article 1, Section 16 of the Louisiana Constitution of 1974 and the Sixth Amendment to the

United States Constitution. The court in State v. Beauchamp, 510 So. 2d 22 (La. App 1st Cir. 1987), writ denied. 512 So. 2d 1176 (La. 1987); State v. Sosa, 446 So. 2 429 (La. App 4th Cir 1984), writ denied 469 U.S. 866, 105 S. Ct. 209.

La. C.Cr P. 701 does not bar prosecution but merely authorizes pre-trial relief; however, the Constitutional right to a speedy trial is not dependent upon a motion, but rather, attaches when an individual becomes an accused, either by formal Indictment or bill of information, or by arrest and actual restraint, State v. Pleasant, 489 So2d 1005 (La. App 1st Cir 1986), writ denied, 493 So.2d 1218 (La. 1986). Three considerations underlie the right to a speedy trial.

1) Prevention of undue and oppressive incarceration prior to trial.
2) Minimization of anxiety and concern accompanying public accusation, and

3) The possibility that long delay would impair the ability of an accused to defend himself. The factor of anxiety of the accused refers to a presumptively innocent defendant who must live under a cloud of suspicion until he has an opportunity to establish his innocence. State v. Johnson, 463 So2d 458 (La. 1978).

Speedy trial claims are evaluated under the four-factor test enunciated in Barker v. Wingo[i], 407 U.S. 514, 92 S.Ct., 2182, 33 L.Ed 2d 101 (1972). The considerations in determining whether a defendant has been deprived of a speedy trial are length of the delay, reasons for delay, defendant's assertion of his right and actual prejudice to defendant.

If the delay is presumptively prejudicial, there will not be an inquiry into the other factors. The peculiar circumstances of the case will determine the weight to be ascribed to the length of the delay and the reason for the delay. State v. Beauchamp, supra at 28, cited in State of Louisiana v. Walter Cowger, No. 90-KA-715 Court of Appeal of Louisiana, Fifth Circuit March 13, 1991.

The state did not diligently or in good faith afford this defendant a speedy trial.

The denial of Gail Willars' right to a speedy trial caused her conviction. Zachary was only eight when the death occurred and nearly ten when he testified at trial. Two years is enough time to cloud and taint the child's memory. Zachary was living with people who were benefiting financially by Willars remaining incarcerated (Alders and Page). They were receiving $1,000.00

per month to care for Zachary. They had two years to poison Zachary against his mother. Why did Zachary stay with these people rather than his own family?

FAIR AND IMPARTIAL TRIAL, IMPROPER/ INADEQUATE JURY INSTRUCTIONS

Jury Instructions were in error. They did not adequately explain the burden of proof in cases based on circumstantial evidence. The law on circumstantial evidence was merely cited with no explanations, or no tying in how that would affect the Willars case. A copy of the jury instructions are in the Appendix page 3.

Robbery under La. R.S. 14:64 & 64.1 is defined as follows:

> ...robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation...

Robbery in Louisiana is a specific intent crime. You cannot use force or intimidation on a dead man. The jury should have been instructed that you couldn't use force or intimidation on a dead man. The jury should have been instructed that "Timing is everything" If you find as a matter of fact that there

was no intent to rob Charles Parr while Charles Parr was alive, you cannot find that James Crandall and Gail Willars were involved in the commission of a robbery. The killing of Charles Parr might still be a crime; but that crime would be of a lesser degree than first and second-degree murder.

The United States Court of Appeals, 5th Circuit, in Humphrey, III vs. Cain, 120 F.2d 526, 138 F.3d 552 (5th Cir La.) Apr.03, 1998),reversed a State Court conviction on appeal from a Petition for Writ of Habeas Corpus because of improper jury instructions. The court en banc decided:

> "We took this case en banc to resolve conflicting panel decisions whether Cage-Victor error fits within the second Teaque exception, making it available in Federal Habeas to a state prisoner whose criminal conviction was final when those cases were decided. We overrule all prior decisions of this court holding to the contrary. For the reasons stated in the panel opinion, we hold that the jury instructions defining reasonable doubt lowered the State's burden of proof below the constitutional minimum. We reverse the district court's judgment denying the Writ of Habeas Corpus and remand the case to the district court with instructions to order the State of Louisiana to either try Elmo Humphrey, III again or release him from custody within 90 days of the date of the district court's order on remand."

The court concluded:

> "the reasonable doubt instruction did not give the defendant the benefit of reasonable doubt as elucidated

by the Supreme Court In Re Winship, 397 U.S. 358, 90 S.Ct 1068 (1970), Cage v. Winship, 498 U.S. 39, 111 S.Ct. 328 (1990) (per curiam) and Victor v. Nebraska 511 U.S. 1, 114 S.Ct 1239 (1994)."

The 5th Circuit panel commented on the fact that the Humphry case was a close and difficult case. The court also commented:

> p. 533 "Of course, a case need not be close in order for us to find reversible error in the reasonable-doubt instruction. But, Humphrey's is a close case nevertheless and makes clear the importance of affording defendants the rights established in Cage and reinforced in Victor. This is not to suggest that Humphrey's conviction was not supported by sufficient evidence; only that evidence was meager and the conviction unpredictable."

Failure of the trial court in the Willars case to explain what a "circumstantial evidence case is" and go over the standard of review in more detail for circumstantial evidence cases was a defect in the "reasonable doubt" instructions as it affected Gail Willars.

PROSECUTION'S IMPROPER COMMENT ON THE EVIDENCE, DENIAL OF RIGHT TO CONFRONTATION

P. 79-81 of the appendix contain excerpts from the prosecution's closing arguments, not based on facts in evidence, intended only to appeal to the prejudices of the jury.

P. 1455, transcript "If she (Gail) cared anything about Zachary, she would have left him in Houston. She only cares about herself. Look what she put this poor boy through."

P. 1455, line 32 "She could have saved a man's life. She chose not to and used her son; blames it on him. Oh! I was worried about him."

Nothing in evidence supported the fact that Parr was alive when Willars and Crandall left him. Willars testified that she believed Parr to be dead. The comments made in the prosecution's closing arguments were intended merely to show "Gail was a bad mother" and lead the jury to believe Willars' inaction caused Parr's death.

SUFFICIENCY OF THE EVIDENCE

Sufficiency of evidence was argued at all levels. But for the testimony of Zachary and Ms. Alders, there would be no evidence that would support a belief that Willars intended to hurt Parr in any way.

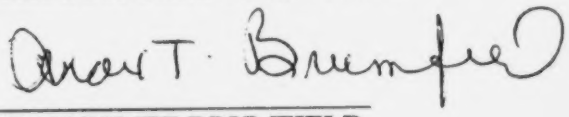
There was no evidence that Willars lured Parr into her room for anything but prostitution. The intent to rob would have had to be inferred from circumstantial evidence. In Louisiana, in order to convict on circumstantial evidence, every reasonable

hypothesis of innocence must be ruled out. This was not done. (statutes and Constitutional Provisions.)

CONCLUSION

The 5th Circuit Court of Appeals erred in denying Certificate of Appealability. A substantial showing of denial of Constitutional rights has been shown and Willars is entitled to her appeal. We respectfully pray that this court grant a Writ of Certiorari and reverse the conviction. In the alternative, Petitioner prays that a Writ of Certiorari be granted and this case be remanded to the 5th Circuit Court of Appeals (or whatever court this court deems appropriate) for further proceedings.

RESPECTFULLY SUBMITTED



ARAX RENEE BRUMFIELD
Attorney at Law
La. Bar No. 03594
P. O. Box 4108
Baton Rouge, Louisiana 70821
(225) 292-6151
(225) 292-6150 fax

(2)

Supreme Court, U.S.
FILED
99 616 OCT 8 1999
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GAIL S. WILLARS
Petitioner

v.

JONES, WARDEN

LA. CORRECTIONAL

INSTITUTE FOR WOMEN
Respondent

APPENDIX

Petition for Writ of Certiorari
To The 5th Circuit Court of Appeal

Arax "Renee" Brumfield
Counsel of Record
Brumfield & Brumfield
4560 Inniswold
Baton Rouge, Louisiana 70809
(225) 292-6151
(225) 292-6150 (fax)

15519

TABLE OF CONTENTS

1. Grand Jury Indictment.....1

2. Charge to Jury.....3

3. Verdict of the Jury.....24

4. Louisiana Court of Appeals Decision.....25

5. Louisiana Supreme Court denial of writs.....54

6. Excerpts from the U.S. District Court, Petition For Habeas Corpus.....55

7. Excerpts from Brief in Support of U.S. District Court Petition for Habeas Corpus.....71

8. Report and Recommendation of Magistrate.....82

9. Judgment Denying Petition for Habeas Corpus ...107

10. District Court Denial of Certificate of Appealability.....108

11. Motion to Certify Appealability.....109

12. Brief in Support of Motion to Certify Appealability.....113

13. Court of Appeals – Denial of Certificate Of Appealability.....151

14. Denial of Rehearing.....154

26TH JUDICIAL DISTRICT COURT INDICTMENT

68,208

STATE OF LOUISIANA

PARISH OF BOSSIER
IN THE TWENTY-SIXTH JUDICIAL DISTRICT

In the name and by the authority of the State of Louisiana, the Grand Jurors duly impaneled and sworn in and for the Parish of Bossier, District and State aforesaid, upon oath, present that:

James Carl Crandall

Gail S. Willars

Late of the Parish of Bossier on or about the 20th day of August in the year of our Lord, one thousand nine hundred and eighty-nine (89) at and in the Parish, District and State aforesaid, did then and there, in the peace of God and State, then and there being willfully

Did commit first degree murder of Charles H. Parr, in violation of the provisions of LRS – 14:30,

I hereby certify that the above and foregoing
Fingerprints on this bill are the fingerprints of
The defendant, James Carl Crandell and that they were placed
thereon by said defendant this 17 day of February, 1991.

S/ C.M Pilkinton

Contrary to the form of the statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

_____
District Attorney, Twenty-Sixth
Judicial District of Louisiana

STATE OF LOUISIANA	NUMBER 68,208
VERSUS	26TH JUDICIAL DISTRICT
JAMES CARL CRANDALL GAIL SUE WILLARS	BOSSIER PARISH,LOUISIANA

CHARGE TO JURY

It is now my duty to instruct you on the law that applies to your deliberations. It is your duty to follow these instructions in reaching your verdict. Although you are the sole judges of the law and the facts on the question of guilt or innocence, you have the duty to accept and apply the law as given by the court. You must decide the facts from the testimony and other evidence and apply that law to those facts in reaching your verdict.

You must not single out any of these instructions and disregard others. The order in which the instructions are given does not indicate that one instruction is more important than another.

If I have given the mistaken impression that I have an opinion concerning the guilt or innocence of the defendants, you are to disregard that impression.

Each defendant is presumed to be innocent until each element of the crime necessary to constitute his or her guilt is proven beyond a reasonable doubt. Neither defendant is required to prove that he or she is innocent. Thus, each defendant begins the trial with a clean slate.

The burden is upon the State to prove each defendant's guilt beyond a reasonable doubt. In considering the evidence, you must give each defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence. If you are not convinced of the guilt of either defendant beyond a reasonable doubt, you must find him or her not guilty.

While the State must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is doubt based on reason and common sense and is present when, after you have carefully

considered all the evidence, you cannot say that you are firmly convinced of the truth of the charge.

You must determine whether a fact has been proven only from the evidence presented or from a lack of evidence. The evidence which you should consider consists of the testimony of witnesses and of exhibits such as writings and physical objects which the court has permitted the parties to introduce.

You must not consider any evidence which was not admitted, or which you are instructed to disregard, or to which an objection was sustained.

You alone determine the weight and credibility of the evidence. As the sole judges of the credibility of witnesses and of the weight their testimony deserves, you should scrutinize carefully the testimony and the circumstances under which the witness has testified. In evaluating the testimony of a witness, you may consider his ability and opportunity to observe and remember the matter about which he testified, his manner while testifying, any reason he may

have for testifying in favor of or against the state or either defendant, and the extent to which the testimony is supported or contradicted by other evidence.

Experts are witnesses who are learned in a particular science, and they are permitted to express their opinion upon scientific matters in their field, but such experts are not called into court for the purpose of deciding the case. You, the jurors, are the ones who, in law, must bear the responsibility of deciding the case. The experts are merely witnesses and you have the right to either accept or reject their testimony and opinion in the same manner and for the same reasons for which you may accept or reject the testimony of other witnesses in the case.

Neither defendant is required by law to call any witnesses or produce any evidence.

Neither defendant is required to testify. No presumption of guilty may be raised, and no inference of any kind may be drawn from the fact that a defendant did not testify.

You should judge the testimony of a defendant in the same manner as you judge the testimony of any other witness.

Evidence is either direct or circumstantial. Direct evidence is evidence which, if believed, proves a fact. Circumstantial or indirect evidence is evidence which, if believed, proves a fact and from that fact you must logically and reasonably conclude that another facts exists.

You cannot find either defendant guilty solely on circumstantial evidence unless the facts proved by the evidence exclude every reasonable hypothesis of innocence.

A bill of indictment is only a written, formal accusation against a defendant charging him with a crime. You are not to consider the bill of indictment as evidence against the defendant. The mere filing of a bill of indictment creates no inference whatsoever that the defendant is guilty.

Statements and arguments made by the attorneys are not evidence.

In the opening statements the attorneys were permitted to tell you the facts they expected to be proven. In closing arguments the attorneys were permitted to present for your consideration their contention regarding what the evidence has shown or not shown and what conclusions they think may be drawn from the evidence. The opening statements and the closing arguments are not to be considered evidence.

You are not to be influenced by sympathy, passion, prejudice or public opinion. You are expected to reach a just verdict.

When you enter the jury room you should consult with one another, consider each other's views, and discuss the evidence with the objective of reaching a just verdict. Each of you must decide the case for yourself, but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to re-examine your own views and to change your opinion if you are convinced you are wrong.

But do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The State of Louisiana has charged that the defendants, James Carl Crandall and Gail Sue Willars, on or about the 20th day of August, 1989, did commit first degree murder of Charles H. Parr, in violation of the provisions of LRS 14:30.

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of armed robbery or simple robbery.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the determination of the jury. If either defendant is convicted of First Degree Murder, the sentence for that defendant or those defendants will be determined by you at a subsequent hearing.

Armed robbery is the taking of anything of value belonging to another from the person of another or which is in the immediate control of another, by the use of force or intimidation, while the offender is armed with a dangerous weapon.

Anything of value must be given the broadest possible construction, including any conceivable thing of the slightest value.

A dangerous weapon includes any instrumentality which, in the manner used, is calculated or likely to cause death or great bodily harm.

Simple robbery is the taking of anything of value belonging to another from the person of another or which is in the immediate control of another when the offender uses force or intimidation, but is not armed with a dangerous weapon.

Criminal intent may be specific or general.

Specific criminal intent is that state of mind which exists when the circumstances indicate that the defendant

actively desired the prescribed criminal consequences to follow his act or failure to act.

General criminal intent is present when the circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. A General criminal intent is always present when there is a specific intent.

Whether criminal intent is present must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances.

All persons concerned in the commission of a crime are principals and are guilty of the crime charged if, whether present or absent, they directly commit the act constituting the crime, aid and abet in its commission, or directly or indiretly counsel or procure another to commit the crime.

In order to be convicted as a principal, the state must prove more than mere presence of the defendant at the crime scene.

An individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant has the specific intent to Kill (illegible writing inserted). It is not enough to find merely that his coconspirator or accomplice had the necessary mental state, since this intent cannot be transferred to the other accused. It must be shown that the other accused also had the specific intent to kill or inflict great bodily harm.

Thus, in order to convict either defendant of first degree murder, you must find:

(1) that the defendant under consideration killed Charles H. Parr: and
(2) that the defendant under consideration acted with a specific intent to kill or inflict great bodily harm; and
(3) that the defendant under consideration was engaged in the commission or attempted

commission of armed robbery or simple robbery.

To convict either defendant of the offense charged, you must find beyond a reasonable doubt that the State proved every element of first degree murder.

If you are not convinced that either defendant is guilty of the offense charged, you may find either defendant guilty of a lesser offense, if you are convinced beyond a reasonable doubt that either defendant is guilty of a lesser offense.

The following offenses are responsive lesser offenses:

(1) Second degree murder

(2) Manslaughter

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm

(2) When the offender is engaged in the perpetration or attempted perpetration of armed robbery or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Manslaughter is:

(1) A homicide which would be murder under either first degree murder or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed without any intent to cause death or great bodily harm when the offender is engaged in the perpetration or attempted perpetration of any felonies enumerated in Article 30, which is First Degree Murder, or Article 30.1, which is Second Degree Murder, which includes the enumerated felonies of armed robbery and simple robbery; or

(3) A homicide committed without any intent to cause death or great bodily harm, during the perpetration or attempted perpetration of any intentional misdemeanor directly affecting the person.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.

A felony is an offense for which the perpetrator may be sentenced to imprisonment at hard labor.

Aggravated battery is a felony defined as the intentional use of force or violence upon the person of another with a dangerous weapon.

Second degree battery is a felony defined as an intentional use of force or violence upon the person of another without the consent of the victim when the offender intentionally inflicts serious bodily injury. Serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss of impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

Theft of one hundred dollars or more is a felony defined as the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

Pandering is a felony defined as the intentional:

(1) enticing, placing, persuading, encouraging, or causing the entrance of any person into the practice of prostitution, either by force, threats, promises, or by any other device or scheme; or

(2) receiving or accepting by a person as a substantial part of support or maintenance anything of value which is known to be from the earnings of any person engaged in prostitution.

False imprisonment with a dangerous weapon is a felony defined as the unlawful intentional confinement or detention of another, without his consent and without proper legal authority, while the offender is armed with a dangerous weapon.

A misdemeanor is any crime other than a felony.

Simple battery is an intentional misdemeanor directly affecting the person defined as the intentional use of force or violence upon the person of another without the consent of the victim.

Aggravated assault is an intentional misdemeanor directly affecting the person defined as an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery committed with a dangerous weapon.

Simple assault is an intentional misdemeanor directly affecting the person defined as an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery committed without a dangerous weapon.

False imprisonment is an intentional misdemeanor directly affecting the person defined as the intentional confinement or detention of another, without his consent and without proper legal authority.

If you find that the defendants fled immediately after a crime was committed or after they were accused of a crime, the flight alone is not sufficient to prove that the defendants are guilty. However, flight may be considered along with all other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt.

A homicide is justifiable when committed in self - defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from the danger.

A homicide is also justifiable when committed, for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm, by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious

danger to his own life or person if he attempted to prevent the felony without the killing.

It is justifiable to use force or violence or kill in defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person.

A person who is the aggressor; however, or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

The following verdicts may be returned:

1. Guilty
2. Guilty of second degree murder
3. Guilty of manslaughter
4. Not guilty

Thus, if you are convinced beyond a reasonable doubt that a defendant is guilty of first degree

murder, the form of your verdict as to that defendant should be: "We, the jury, find the defendant guilty."

If you are not convinced beyond a reasonable doubt that a defendant is guilty of first degree murder, but you are convinced beyond a reasonable doubt that a defendant is guilty of second degree murder, the form of your verdict as to that defendant should be: "We, the jury, find the defendant guilty of second degree murder."

If you are not convinced beyond a reasonable doubt that a defendant is guilty of second degree murder, but you are convinced beyond a reasonable doubt that a defendant is guilty of manslaughter, the form of your verdict as to that defendant should be "We, the jury, find the defendant guilty of manslaughter."

If the State has failed to prove beyond a reasonable doubt that a defendant is guilty of either the offense charged or a lesser offense, the form of

your verdict as to that defendant should be: "We, the jury, find the defendant not guilty."

Twelve of your number must concur in order to render any verdict in this case. However, in reaching a verdict each of you should vote your own honest and considered conviction as to the guilty or innocence of the defendant based upon the evidence and the law.

You must render a separate verdict for each defendant. Therefore, I will hand you two list of responsive verdicts, one for each defendant.

When you retire to deliberate, you must elect one of your number to serve as foreman, whose duty it will be to conduct or preside over your deliberations, and, when you have reached a verdict to write that verdict on the back side of the list of responsive verdicts which I shall hand you, sign it as foreman and present it to the court when you return.

Please write nothing other than your verdict on the reverse of each verdict sheet, and make certain it is in the form of one of the responsive verdicts listed on the front side.

You must now remain together until you reach your verdict.

Charge delivered at Benton, Louisiana this the 17th day of February, 1991.

S/ Harmon Drew, Jr.
HARMON DREW, JR., DISTRICT COURT

(This was handwritten on the bottom of the page)
Exempt:

1. Cant send written charge
2. Further instructions available
3. Communicate w/ bailiff
4. Ask for exhibits, if you like
5. Mr. McGee & Mrs. Edwards to stay in ct. room.

VERDICT OF THE JURY

WE, the jury, find the Defendant, Gail Sue Willars Guilty of Second Degree Murder.

S/ Paul Jerome Zualey
Foreman

17 February 1991
Date

STATE OF LOUISIANA

COURT OF APPEALS

SECOND CIRCUIT

DOCKET NO. KA/94/27394

STATE OF LOUISIANA,
APPELLEE,

v.

GAIL SUE WILLARS,
APPELLANT.

(La.App. 2 Cir. 9/27/95); 661 So.2d 673

Court of Appeal of Louisiana,

Second Circuit.

September 27, 1995.

Rehearing Denied October 26, 1995.

APPEAL FROM DISTRICT COURT, PARISH OF BOSSIER,
NO. 68,208, STATE OF LOUISIANA,
HONORABLE HARMON DREW, JR., J.

Arax T. Brumfield, ,
Jimmie A. Brumfield
Baton Rouge, Louisiana
For Appellant

Richard Ieyoub, Attorney General, James M. Bullers, District Attorney, for appellee.

Before HIGHTOWER, WILLIAMS and STEWART, JJ.

WILLIAMS, Judge.

The defendant, Gail Sue Willars, and her co-defendant James Crandell, were charged with the first degree murder of Charles H. Parr, a violation of LSA-R.S. 14:30. After a jury trial, Gail Willars was convicted of second degree murder, a violation of LSA-R.S. 14:30.1. The court sentenced her to life imprisonment. Willars now appeals her conviction and sentence. For the following reasons, we affirm.

FACTS

In the summer of 1989, the defendant, Gail Willars, along with James Crandell and her eight-year-old son, Zachary Willars, traveled to Bossier City. They temporarily moved into Room 15 of the Beacon Manor Motel and lived there for several weeks.

Eventually, Willars and Crandell began to run out of money. The motel management ordered them to vacate the room by Monday, August 21, for failure to pay the rent. Over a three day period, Willars attempted to contact her father and friends in

order to raise funds. Crandell and Willars also discussed the possibility of her working as a prostitute to earn money. Willars testified that on several occasions she talked to another tenant at the motel about prostitution and spoke with several potential customers, but she was unwilling to prostitute herself at the time.

On Sunday, August 20, 1989, Willars made several attempts to telephone her father and friends. On her way to a pay phone, Charles Parr approached her several times. Willars testified that prior to making a final trip to the phone, she instructed Crandell to leave the room with Zachary if she did not return in a few minutes. She stated that her plan was to bring a customer back to the room if she was unable to reach anyone. During trial, Willars described the following sequence of events:

She was unable to contact her friends. Mr. Parr then approached her at the pay phone and offered her $30.00 to perform oral sex. She rode back to the motel with Parr, they entered room 15 and Parr then asked for more than oral sex and she refused. An argument ensued and Parr grabbed Willars by the shoulders and picked her up off the floor. At this point, Crandell entered the room from the bathroom and surprised her. Crandell hit Parr across the back with a stick and a struggle ensued. The

fighting stopped when Crandell produced a knife. Crandell bound Parr's hands with duct tape and put him in a closet. Parr eventually loosened his bindings, escaped from the closet and began to struggle with Crandell again. Willars told the men that her son was in the bathroom and she asked them to stop fighting. Parr paused and Crandell grabbed a cast iron frying pan and hit Parr over the head several time. Crandell dragged Parr back into the closet.

Willars testified that Crandell told her that Parr was dead, but she thought he was still alive.

Willars then helped Crandell clean the room. She wiped blood from the mirrors and the carpet and she removed blood-stained sheets from the bed. Willars and Crandell loaded their belongings into Parr's car and drove with Zachary to Chicago, discarding several items along the way. Once in Chicago, the three stayed with Hank and Roberta Alders. Crandell pawned several of Parr's belongings to raise money.

On Monday, August 21, 1989, two motel employees found Parr's body in room 15. Dr. George M. McCormick, II, the Caddo Parish coroner, performed an autopsy and testified that Parr had suffered multiple injuries Parr had abrasions on his knees

and bruises under his arms that were consistent with being dragged.

Parr had several bruises and abrasions on his head that were consistent with blows from a blunt instrument with ridges or edges. Dr. McCormick testified that there were a minimum of four blows to the head and that Parr had died of heart failure due to swelling of the brain. The coroner also stated that death occurred more than thirty minutes, and perhaps as long as an hour, after the time of injury. Parr also had what Dr. McCormick described as defensive wounds, which indicated that he had been involved in an altercation.

On August 29, 1989, Chicago police officers in cooperation with the Bossier Police Department, arrested Willars and Crandell at the Alders' residence in Chicago. The police found several of Parr's belongings, including a gun, at that location. Mrs. Alders testified that both Crandell and Willars told her that, they were running from the law because they had killed a man. Parr's jewelry was recovered from a jewelry store in Chicago. Willars' eight-year-old son, Zachary, was in the bathroom with Crandell when Willars and Parr entered the motel

room. At trial, Zachary testified that Crandell jumped out of the bathroom with a knife in his hand and that Willars hit Parr on the head with a stick. Zachary also stated that Crandell put tape around Parr's hands and placed him in the closet, but later Crandell took him out of the closet because he was making noise. Zachary testified that Willars gave the frying pan to Crandell, who began hitting Parr on the head. Zachary said that he saw blood hit the mirrors and the blankets. At that point, Willars closed the bathroom door and Zachary was unable to see anything more.

Zachary testified that he never saw Parr hit Crandell or Willars. He also stated that he saw Willars throw the bloody blankets out of the car.

Willars and Crandell were tried together in February 1991. Crandell was convicted of first degree murder and Willars was convicted of second degree murder. On October 18, 1994, the trial court granted Willars' post-conviction application to file an out-of-time appeal.

DISCUSSION

Sufficiency of the Evidence (Assignment of Error No. 3)

When issues are raised on appeal concerning the sufficiency of the evidence and one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The sufficiency issue is reviewed first because the accused may be entitled to an acquittal under Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Hearold, 603 So.2d 731 (La. 1992).

Under Jackson v. Virginia, supra, the proper standard of appellate review for a sufficiency of evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. State v. Hearold, supra; State v. Bellamy, 599 So.2d 326 (La.App. 2d Cir.), writ denied, 606 So.2d 1089 (La. 1992).

This court's authority to review questions of fact in a criminal case is limited to the sufficiency-of-the-evidence evaluation under Jackson v. Virginia, supra, and does not extend to credibility determinations made by the trier of fact. LSA-La. Const., Art. 5, Sec. 5(C); State v. Williams, 448 So.2d 753 (La.App. 2d Cir. 1984). A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. State v. Rogers, 494 So.2d 1251 (La.App. 2d Cir. 1986), writ denied 499 So.2d 83 (La. 1987). The Jackson standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of such evidence must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. State v. Sutton, 436 So.2d 471 (La. 1983); State v. Lott, 535 So.2d 963 (La.App. 2d Cir. 1988).

Second degree murder is defined as the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm, or when the offender is engaged in one of the listed felonies. LSA-R.S. 14:30.1. A person may be convicted of an offense even if he has not committed the actual offense if he is found to be a principal. A principal is defined as:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. LSA-R.S. 14:24.

Thus, in order to find Willars guilty of second degree order, the jury must have found either that she specifically intended to kill Parr or inflict great bodily harm, or that she was engaged in the perpetration of a robbery along with Crandell, when Parr was killed. Robbery is defined as the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by the use of force or intimidation. LSA-R.S. 14:64, 14:64.1, 14:65.

The state argues that the evidence established that Willars and Crandell acted in concert to lure Parr into the motel room for the purpose of robbing him, and that during this robbery the victim received injuries which resulted in his death. The state

asserts that Willars was a principal to the robbery and murder of Parr.

Willars argues that the state failed to prove that she had the specific intent to kill or inflict great bodily harm. She asserts that her intent was to engage in prostitution and not to harm or rob Parr. She further argues that the robbery did not occur until after the fatal blows were struck, and therefore the evidence does not support a second degree murder conviction.

The state proved by direct evidence that Parr was robbed of his cash and jewelry and that he died as a result of several blows to the head with a blunt object. The state's theory of the case with respect to Willars was that, although she did not, strike the fatal blows, she did lure the victim into the motel room with the intent, to rob or inflict great bodily harm. The state presented the following circumstantial evidence to prove that Crandell and Willars acted in concert.

First, the state introduced evidence that Willars and Crandell needed money to pay for their motel room. This is evidence of a motive to commit robbery.

Second, Zachary testified that when he and Crandell hid in the bathroom prior to Willars' return to the room, Crandell

already held a knife in his hands. These are circumstances from which a reasonable trier of fact could conclude that Crandell and Willars planned to surprise the person whom Willars brought to the room.

Third, Zachary testified that Willars struck Parr with a stick after Crandell emerged from the bathroom and that she handed Crandell the frying pan. This is further evidence of Willars' intent and of her participation in the crime.

Fourth, Willars admitted that she helped clean the room after the murder and discarded evidence during the drive to Chicago. These actions are evidence that Willars attempted to conceal the crime and avoid capture.

Finally, the state introduced evidence that Crandell and Willars fled to Chicago immediately following the murder. Flight is a circumstance which may be used by the trier of fact to infer guilty knowledge. State v. Fuller, 418 So.2d 591 (La. 1982); Bellamy, supra.

In a similar case, the Fifth Circuit Court of Appeal found sufficient direct and circumstantial evidence to affirm the defendant's conviction of second degree murder. State v. Horne,

554 So.2d 820 (La.App. 5th Cir. 1989). In Horne, the state introduced circumstantial evidence to show that the defendant and her two roommates were without funds, that they faced imminent eviction, and that the defendant had lured the victim from a bar to the apartment, where he was murdered and robbed. Although there was no evidence that the defendant participated in the actual killing or robbery, she was found to be a principal in the crimes because she provided the victim.

In the present case, Willars did not strike the fatal blows nor was there evidence that she actually took anything of value from the victim's person. There was, however, circumstantial evidence from which a jury could decide that Willars and Crandell acted in concert to perpetrate a robbery scheme. A reasonable trier of fact could conclude that Willars lured the victim into the motel room so that he could be robbed. Zachary's testimony that Crandell lay in wait with a knife, that Willars hit Parr with a stick and handed a skillet to Crandell, and Willars' admission to cleaning the room and fleeing to Chicago are all circumstances from which a jury could conclude that Willars was a principal to the robbery and resulting murder of Charles Parr.

The state also produced evidence that Willars possessed the specific intent to inflict great bodily harm. Specific intent is a state of mind that need not be proven as a fact. It may be inferred from the circumstances of the transaction and the actions of the defendant. State v. Brown, 618 So.2d 629 (La.App. 2d Cir.), writ denied, 624 So.2d 1222 (La. 1993). Zachary testified that he saw his mother hit the victim with a stick and saw her give Crandell the frying pan, which ultimately became the murder weapon.

From these circumstances a jury could infer Willars' specific intent to inflict great bodily harm. When viewed in the light most favorable to the prosecution, there is sufficient evidence, direct and circumstantial, for a reasonable trier of fact to conclude that Willars acted as a principal to the robbery and murder of Charles Parr, or that she possessed the specific intent to inflict great bodily harm upon Parr. Therefore, this assignment of error is without merit.

Ineffective Assistance of Counsel (Assignment of Error No. 2)

Willars argues that her lawyer's performance deprived her of the effective assistance of counsel. The issue of ineffective assistance of counsel is more properly raised in a motion for post-

conviction relief rather than by direct appeal. The reason for this process is to allow for a full evidentiary hearing on the allegations of ineffective assistance. State v. O'Neal, 501 So.2d 920 (La.App. 2d Cir.), writ denied, 505 So.2d 1139 (La. 1987); State v. Barnes, 365 So.2d 1282 (La. 1978). However, if the record fully discloses the evidence necessary to decide the issue, it may be considered on direct appeal in the interest of judicial economy. State v. Ratcliff, 416 So.2d 528 (La. 1982); State v. Smith, 25,841 (La.App. 2d Cir. 2/23/94), 632 So.2d 887. The record in this case is sufficient to rule on Willars' allegation of ineffective assistance of counsel. However, some of her arguments are more properly deferred for post-conviction relief.

The right of a defendant in a criminal proceeding to the effective assistance of counsel is mandated by the Sixth Amendment, to the U.S. Constitution. State v. Wry, 591 So.2d 774 (La.App. 2d Cir. 1991). The U.S. Supreme Court, in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), established a two-prong test to determine ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient such that counsel made errors so serious that he was not functioning as the "counsel"

guaranteed by the Sixth Amendment. Secondly, defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, with a reliable result. Strickland, supra at 687, 104 S. Ct. at 2064.

The relevant inquiry is whether counsel's representation fell below the standards for reasonableness and competency required by prevailing professional standards for attorneys in criminal cases. Strickland, supra; State v. Moore, 575 So.2d 928 (La. App. 2d Cir. 1991). There is a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance. Strickland, supra. The defendant bears he burden of proving that certain acts or omissions by his counsel were deficient and that this deficiency led to an unreliable outcome. State v. Wry, supra. The defendant must prove actual prejudice before relief will be granted. It is not enough to show that the error had some conceivable effect on the trial's outcome. To prevail under the dual test of Strickland, the defendant must show that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial

would have been different. State v. Grissom, 624 So.2d 476 (La.App. 2d Cir. 1993).

First, Willars alleges that defense counsel failed to object to the admission of inculpatory statements made by Willars, although the trial court had ruled they would be excluded. On February 13, 1991, prior to opening statements, the district attorney filed a notice of intent to use statements made by Willars and Crandell to Roberta Alders, Henry Alders and Lorrie Page. That same day, the defense attorneys filed a joint motion in limine requesting that those statements be suppressed because the state was aware of the statements prior to February 12, 1991, but failed to notify the defense of its intention to use them. The record does not contain a transcript of a hearing on this matter. However, the court minutes indicate that the matter was argued and that the trial court ruled that the statements made by the co-defendants to Roberta Alders and Lorrie Page could not be used in the state's case-in-chief.

During direct examination of Mrs. Alders, the following exchange took place:

> Q: Now, pertaining to them coming to Chicago, what did they tell you?

A: They both at separate times said that they had come to Chicago to leave Gail's son Zachary with my husband and I because they had had to kill a man and were running from the law.

Neither defense counsel objected to this question or answer. There was no cross-examination of Mrs. Alders by either attorney.

The defense counsel's failure to object to the introduction of Willars' statement does not satisfy the second prong of the Strickland test. Willars admitted at trial that she was present when Parr was killed and that she fled with Crandell to Chicago. Her defense was that she did not possess the intent to inflict great bodily harm or to commit robbery. Although the statement recounted by Mrs. Alders was improperly introduced at trial, it did not supply any new information about the crime to the jury. Thus, Willars has failed to show that, but for the defense counsel's error, there is a reasonable probability that the outcome of the trial would have been different.

Willars also contends that her lawyer failed to call available witnesses at trial. The defense counsel called as witnesses the investigating officer, William Ray, Willars and her

father, Gerald Sisco. The defense counsel elicited testimony from Willars concerning her intent to commit prostitution and her lack of intent to harm the victim. Sisco testified concerning Zachary's mental capability and the child's belief that his mother had killed his father. Sisco also testified that Crandell exercised control over Willars. She does not specify any additional persons who could have been called to testify. This argument does not establish ineffective assistance of counsel.

Willars asserts that defense counsel erred in failing to object to the trial judge's ruling that Zachary was competent to testify. Defense counsel argued that Zachary was incompetent to testify and subsequently reserved an objection to the court's ruling finding the witness competent. The trial counsel was not deficient in this regard.

Willars further argues that her counsel erred in failing to attack Zachary's credibility. She points to several discrepancies between Zachary's testimony and the physical evidence as possible means to cast doubt on his credibility. It is a reasonable trial strategy not to harshly question a young witness. Defense counsel challenged Zachary's credibility during closing argument.

Further, counsel pointed out the discrepancies in Zachary's testimony and argued that the young child was susceptible to suggestions from the district attorney.

In sum, the record fails to support Willars' allegation that her trial counsel was deficient or that, counsel's deficiencies deprived her of a fair trial under the Strickland standard. Several of Willars' allegations of ineffective assistance of counsel are not evident from the record. For example, she alleges that defense counsel refused her requests to file motions for a speedy trial and for severance. There is no evidence in the record concerning her requests. Willars also alleges that a conflict of interest existed because she refused to sign over book rights to her court appointed attorney. Such allegations require additional evidence for resolution. Willars' remedy is to seek post-conviction relief in the trial court, where the circumstances and validity of these allegations can be fully explored in an evidentiary hearing.

Witness Competency (Assignment of Error No. 4)

Willars argues that the trial court erred by finding Zachary Willars competent to testify.

Every person of proper understanding is competent to be a witness except as otherwise provided by legislation. LSA-C.E. Art. 601. The question of a person's competency to be a witness is determined by the trial judge. LSA-C.E. Art. 104(A).

Proper understanding, not age, is the test of competency for any witness and great weight is given to the trial judge's determination of competency because of his opportunity to see and hear the witness. The trial court's decision should not be overturned absent manifest error. State v. Bean, 582 So.2d 947 (La.App. 2d Cir.), writ denied, 586 So.2d 567 (La. 1991).

Zachary was eight years old at the time of the murder and was nine years and eleven months old at the time of trial. During the competency hearing, the trial judge questioned Zachary about his age, his grades in school, his living arrangements and the length of time he had resided in Louisiana. Zachary answered these questions in a polite and responsive manner. When asked whether he knew the difference between the truth and a lie, Zachary first responded that "a lie is something that gets you in trouble. The truth can help you." Upon further questioning, Zachary stated that the "truth is good and something that's not the truth is bad, a lie." At that point, the judge ruled that based on his

overall demeanor, his grades and the fact that he did not appeal coached, Zachary was competent to testify.

Willars states that the trial court refused to allow the attorneys to question Zachary. The trial court did ask if the defense attorneys wanted to question the witness, and they did not respond. However, Willars' lawyer did request that the court question Zachary further about the difference between the truth and a lie. The trial court complied with this request.

The trial court's evaluation of Zachary's demeanor is entitled to great deference. Bean, supra. The record does not indicate that the trial court was clearly wrong in ruling that Zachary was competent to testify. The issue of Zachary's competence was also raised in Crandell's appeal and this court held that the trial court did not err by allowing the child to testify. State v. Crandell, 604 So.2d 123 (La.App. 2d Cir. 1992).

Willars also states that her attorney failed to introduce Zachary's medical records and to point out the boy's belief that his mother killed his father. The record contains a 1988 psychiatric assessment of Zachary, who exhibited behavioral problems at school following the death of his father. This evaluation stated that there was no indication of any thought

disorder and that Zachary's memory was fair. After reviewing these medical records and the trial transcript of the competency hearing, we cannot say the trial court abused its discretion in ruling the witness competent to testify.

This assignment is without merit. Severance and Speedy Trial (Assignments of Error Nos. 5 & 6)

Willars argues the trial court erred in denying an oral motion to sever. The record does not contain a motion to sever from either of the defendants. Although the issue of severance was raised during a hearing on Crandell's motion for a continuance, no formal motion to sever was ever made. However, the trial court granted a continuance and ruled that Willars' case would also be continued. The court's ruling implicitly denied a severance, but the defense did not object.

An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. State v. Minnifield, 475 So.2d 108 (La.App. 2d Cir. 1985); LSA-C.Cr.P. Art. 841. This assignment of error without merit.

Willars also contends that she was denied a speedy trial.

Willars was indicted on September 5, 1989. Several continuances were granted to her co-defendant Crandell, who

sought the appointment of a sanity commission. The case was set for trial in September, 1990 and the trial began on February 11, 1991, approximately 17 months after the indictment. There is no indication in the record as to why the trial was continued from the September 1990 date. The state points out that several attorneys involved in the proceedings were candidates for public office in the fall of 1990, including Willars' counsel.

Willars did not file a motion requesting a speedy trial nor did she file a motion to quash based upon the denial of a speedy trial. There is no indication that Willars was prejudiced by the delay, nor does she assert that her trial preparation was impaired. Therefore, this assignment is without merit.

Jury Instructions (Assignment of Error No. 9)

Willars argues the trial court gave erroneous jury instructions that confused the issue of manslaughter and failed to explain the burden of proof in cases based on circumstantial evidence. She also contends that the trial judge should have instructed the jury to consider the time element involved in the commission of the crime. She maintains that because nothing was taken from the victim until after the fatal blows were struck,

there was no intent to rob prior to death, and her act could no be second degree murder.

LSA-C.Cr.P. Art. 802 requires the trial court to charge the jury as to the law applicable to the case. This article obligates the trial judge to charge the jury, when properly requested, as to the law applicable to any theory of defense which the jurors could reasonably infer from the evidence. State v. Jackson, 450 So.2d 621 (La. 1984);

State v. Harris, 26,411 (La.App. 2d Cir. 10/26/94), 645 So.2d 224.

The record indicates that the trial court did instruct the jury about direct and circumstantial evidence and its explanation of manslaughter conformed to the statutory language defining the offense. In response to jury inquiries, the trial court twice repeated the instructions regarding first and second degree murder and manslaughter. There is no indication that the jury's requests for clarification were unusual during a deliberation in a capital case.

Finally, there is no support for Willars' argument that the trial court should have instructed the jury as to the time element of the offense. The jury could conclude that the intent to commit

robbery existed at the time the fatal blows were struck, and herefore the killing occurred during the perpetration of the crime.

This assignment of error is without merit.

Scope of Argument (Assignment of Error No. 7)

Willars argues that the district attorney erroneously commented on facts not introduced into evidence during his closing argument. She also asserts that the state's remarks concerning Zachary were improper.

LSA-C.Cr.P. Art. 774 states that the closing argument hall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice and the state's rebuttal shall be confined to answering the argument of the defendant.

Willars testified about a struggle between Crandell and Parr. She talked about her concern for Zachary as a motivation for some of her actions. After reviewing the trial transcript, we are convinced that there is no merit to Willars' argument that the state violated Article 774. This assignment of error lacks merit.

Inculpatory Statements (Assignment of Error No. 8)

Willars argues that the trial court erred in allowing Mrs. Alders to testify about alleged inculpatory statements. During the state's direct examination, Mrs. Alders testified that Crandell and Willars said that they came to Chicago to leave Zachary because they had to kill a man and were running from the law.

Willars asserts that this statement should have been excluded because the district attorney failed to notify defendants of the statement during pre-trial discovery. Prior to opening statements, the defendants sought and were granted an order from the trial court to exclude the statement from the state's case-in-chief. However, the defense did not object or request an admonishment when Mrs. Alders recounted the statement.

An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. LSA-C.Cr.P. Art. 841. This assignment of error lacks merit.

Assignments of Error Nos. 1 and 11

Willars states that the jury was not fair or impartial because: 1) the jury did not represent a cross section of society, 2) the court allowed use of peremptory challenges, and 3) an entire class and race were excluded from the jury. Willars

did not specify which race or class was excluded or specify which jurors should have been excused for cause.

A mere statement of an assignment of error in a brief does not constitute briefing of the assignment. State v. Williams, 632 So.2d 351 (La.App. 1st Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So.2d 139; State v. Toney, 26,711 (La.App. 2d Cir. 3/1/95), 651 So.2d 387. Assignments of error neither briefed nor argued are deemed abandoned. URCA Rule 2-12.4. Furthermore this issue was raised in the co-defendant's appeal and found to be without merit. State v. James Crandell, supra.

Willars also contends that the trial court erred in not accepting as true uncontroverted evidence contained in two letters written by Crandell clearing her of the murder charge. Willars read to the jury two letters which Crandell wrote to her while they were incarcerated and awaiting trial. She asserts that this evidence was unchallenged and that the trial court should have accepted it as true. She cites no authority to support this assignment.

A mere restatement of an assignment of error in a brief, without argument or citation of authority, does not constitute the briefing of the assignment. Williams, supra; Toney, supra.

Assignments of error neither briefed nor argued are deemed abandoned. URCA-Rule 2-12.4.

Error Patent (Assignment of Error No. 10)

LSA-C.Cr.P. Art. 930.8(C) provides that at the time of sentencing, the trial court shall inform the defendant, of the prescriptive period for post-conviction relief. The sentencing transcript is not included in the record submitted to this court. Although the failure to comply with Article 930.8(C) is not grounds for reversal of the sentence or a remand, the notice required by that article must be satisfied. LSA-C.Cr.P. Art. 921.

The trial court is directed to review the sentencing transcript to verify compliance with this article. If the required notice was not provided to the defendant, the district court is directed to give defendant written notice of the prescriptive period for post-conviction relief within ten days of the rendition of this opinion and to file proof of defendant's receipt of such notice in the record of the proceedings. State v. Smith, 600 So.2d 745 (La.App. 2d Cir. 1992).

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.

APPLICATION FOR REHEARING

Before MARVIN, NORRIS, HIGHTOWER, WILLIAMS and STEWART, JJ.

Rehearing denied.

THE SUPREME COURT
OF THE STATE OF LOUISIANA

STATE OF LOUISIANA NO. 95-k-2825

VS

GAIL SUE WILLARS

IN RE: Willars, Gail Sue; - Defendant(s): Applying for Writ of Certiorari and/or Review; Parish of Bossier 26th Judicial District Court Div. "D" Number 68,208; to the Court of Appeal, Second Circuit, Number 27394-KA

March 29, 1996

Denied.

WFM
PFC
JCW
HTL
CDR
BJJ
JPV

Supreme Court of Louisiana
March 29, 1996

S/ not legible
Clerk of Court
For the Court

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GAIL S. WILLARS	*	DOCKET NUMBER 97-236-A-1
VERSUS	*	MAGISTRATE NO.
STATE OF LOUISIANA, LOUISIANA ATTORNEY GENERAL AND LOUISIANA CORRECTIONAL INSTITUTE IN ST. GABRIEL, LOUISIANA	*	

EXCERPTS FROM

PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. 2254 - STATE CUSTODY

NOW INTO COURT, through undersigned counsel, comes and appears Gail S. Willars, who with respect prays for relief under 28 U.S.C. 2254.

1. Name and location of court which entered the judgment of conviction?

   State Court Proceeding
   26th Judicial District
   Parish of Bossier
   P. O. Box 369

Benton, Louisiana 71006

2. Date of judgment of conviction?

August 14, 1991

3. Length of Sentence?

Life without benefit of probation or parole

4. Nature of offense?

Second Degree Murder

5. What was your plea?

not guilty

6. Kind of trial?

Jury

7. Did you testify at that trial?

Yes

8. Did you appeal from the judgment of conviction?

Yes

9. If you did appeal, answer the following.

Court of Appeals

(a) Name of court - State of Louisiana, 2nd Circuit Court of Appeal, Shreveport, Louisiana, Docket No. KA/94/27394.

(b) Result - Affirmed

(c) Date of result - September 27, 1995

Supreme Court

(a) Name of Court - Louisiana Supreme Court, New Orleans, Louisiana. Docket No. 95-K-2825.

(b) Writs Denied

(c) Date of result - March 29, 1996, Timely Motion for Rehearing filed April 11, 1996 and was denied May 3, 1996.

10. Other than direct appeal from thejudgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes

11. If your answer to 10 was "Yes," give the following information.

FIRST PETITION FOR POST CONVICTION RELIEF

(a)(1) Name of Court - 26th Judicial District Court, Bossier Parish, State of Louisiana.

(2) Nature of proceeding.

Immediately after Gail Willars conviction, a timely Motion for Appeal was filed by her former attorney, Robert Raley. Ms. Willars was declared not to be a pauper and Mr. Raley immediately withdrew as counsel of record. No return date was ever set for the direct appeal and the appeal never went forward. Not really being sure whether or not I still had

a direct appeal, I filed two motions. I filed a Petition for Post Conviction Relief and a Motion to set return date on the appeal. A return date was set on the appeal and the appeal went forward. The court of appeals made reference the matter being taken up as an out of time appeal pursuant to a Petition for Post Conviction Relief. I am not sure whether or not the appeal process was considered direct appeal or appeal pursuant to Post Conviction Relief.

(3) Grounds raised:

(a) Request for out of time appeal

(b) Denial of Counsel during interrogation and denial of effective assistance of counsel during pre-trial and trial process.

(c) Denial of trial by fair and impartial jury.

(d) Denial of Willar's request to sever trial

(e) Insufficient evidence - objected to Zachary Willar's testimony as being unreliable and asserted that Zachary was coached on the stand.

(f) Second-degree murder statute and jury instructions were unconstitutionally vague.

(g) Willars' attorney called her to testify against her will, denying her, her Constitutional right to remain silent.

(h) Reserved errors patent on the face of the record or which counsel has not listed, such as but not limited to Right to Cross Examine Witnesses, Right to

Confrontation, Right to a Fair and Impartial Trial and right to effective assistance of counsel.

(i) Willars was under duress during her entire incarceration because her son was under the care, custody and control of friends of her co-defendant, James Crandall.

(5) Result - Allowed to proceed with direct appeal. Other than that, no real decision was made on that Petition for Post-Conviction Relief.

(6) Date of Result - Not applicable.

...

SECOND PETITION FOR POST CONVICTION RELIEF

(BASICALLY SAME AS FIRST)...

GROUNDS

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

A. DENIAL OF EFFECTIVE ASSISTANCE OF PROCESS

Gail Willars was denied effective assistance of counsel during the pre-trial and trial process.

1.) No motions were filed on behalf of Gail Willars, although Gail actually prepared and asked Raley to file a Motion to Sever and a Motion for Speedy Trial. Raley refused to file the motions and informed Willars that if she field them herself, he would oppose them.

2.) Robert Raley cross-examined Gail's young son Zachary, leading the child to make statements against Gail's interest. Because of the child's youth, emotional trauma and learning disability, it was easy to lead the child.

3.) Although Robert Raley had in his possession a certified copy of Zachary Willars' psychological records from Charter Hospital in Kingwood, Texas, he refused to submit them to the judge for his consideration while determining competency of the child to testify and he refused to introduce them into evidence to impeach the testimony of the child. The court did not learn that Zachary failed kindergarten twice, was a constant disciplinary problem, and was a pathological liar.

4) Robert Raley failed to insist upon a severance of the trial from that of James Crandall even though James Crandall and Gail Willars had conflicting defenses. No formal Motion to Sever the trial between the two defendants was ever filed. Because the trial was not severed, Gail was prevented from introducing evidence of Crandall's violent character, any of the emotional and psychological abuse suffered by her at the hands of James Crandall or the threats to herself and to her child, both before and after she was in custody. Such was essential to proving that Gail Willars was a victim, bot a willing participant.

Had the trials been severed, Gail would have received a speedy trial, as several continuances were obtained because of the actions of James Crandall.

5) Counsel for defendant did no investigation, filed no motions and barely talked to his client and failed to subpoena or call witnesses on Gails

behalf. Witnesses could have been called to testify:

a) Concerning the victim's mistreatment of other women (particularly tricks)

b) Parr normally took his jewelry off and left it in the car before going into the motel.

(Glenda Adams, a prostitute, "tricked" with Parr

and could have testified as to a) and b).

c) Frying pan - the fact that it was in the room and Gail used it to cook. The prosecution made it appear that the frying pan was placed in the room for the sole purpose of killing Parr. Carolyn Wyatt, a Beacon Manor prostitute could testify as to the frying pan.

d) Gail's intent to commit prostitution, not robbery. To Gail Willars, Parr was a source of $30.00, not a target of robbery and murder.

e) Zachary's mental condition - See attached report from Charter hospital. There were other school records and psychological records that could have been obtained by Raley. All condemn Zachary as incompetent.

f) Mr. Sisco, Gail's father could have testified as to her monetary condition. Gail received money every month from Sisco. She only needed a small amount of money to hold her over a few days. She did not need to rob Parr.

g) Where Gail's funds were sent.

h) Zachary's belief that his mother killed his father.

i) Crandall's control over Gail. Several people could have testified as to Crandall's control over Gail, in addition to his control over other women in his life. Examples would be Denise Crandall, his former wife, Debra Martin, former girl friend, Kathy Blankenship and her parents.

j) Crandall's violent nature. Cellmates with Crandall were well aware of his violent nature and overheard threats to Gail concerning her son.

k) Raley's comment after court that Willars got what she paid for, nothing. (See copy of attached affidavit)

l) Responsive verdict of Manslaughter was not argued. Had Willars received a lesser offense, she would have a chance for a new life. She and Crandall share an equal punishment, when Gail's involvement was not equal.

6) The prosecution failed to notify defendants that Ms. Alders was to testify against them concerning alleged inculpatory statements made by Gail. One of Gail's alleged statement was that "We had to kill a man." Because of the failure to provide this information timely on discovery, Judge Drew suppressed the statements. Ms. Alders testified and the jury was allowed to hear the statement that had previously been suppressed.

Another statement was

"As I understand, they were on their way to Michigan to collect a sum of $65,000.00 from whom I don't know."

7) Conflict of Interest

a. Robert Raley was running for Judge on a "Get tough on crime campaign."

b. Robert Raley would not allow Gail Willars to file for Speedy Trial because a speedy trial would have interfered with Raley's campaign plans.

c. Robert Raley wanted Gail to sign over book and/or movie rights to her story. He was more interested in rights to her story than in her defense.

d. At the conclusion of the trial, Raley was seen by Colleen Krapcha shaking the victim's son's hand and apologizing to him for representing Gail. He stated that Gail got what she paid for, nothing.

Colleen Krapcha
2600 Bardot Lane
Bossier City, La. 71111

8. Raley failed to properly prepare for trial and spent very little time conferring with his client, Gail Willars. An examination of the Jail Records will reflect the number of times and length of visits Raley made to Willars.

9. Raley insisted that Zachary Willars remain in Chicago in the care of friends of co-defendant, James Crandall, while at the same time, threats were being made by James Crandall to Gail Willars and Zachary.

B. FAILURE TO SEVER THE TRIALS OF CO-DEFENDANTS

EVEN THOUGH CO-DEFENDANTS HAD MUTUALLY EXCLUSIVE DEFENSES

Willars was not allowed to sever the trials of her and her co-defendant, James Crandall, even though they had mutually exclusive defenses. Willars was damaged as follows: (Early in the case, an oral motion to sever was made and denied)

a. She was denied a speedy trial, as James Crandall had numerous continuances and delays caused by his Sanity Defense, suicide attempts, etc. - Raley stated that should Gail file the Motion for Speedy Trial, he would openly oppose it.

b. Motion in Limine was filed by James Crandall, and was granted prohibiting Willars from presenting character testimony of James Crandall, an essential element of Gail's defense would have been a showing that she was a victim of prolonged emotional and psychological abuse and that she was reasonable in her fear for herself and her young child.

c. Threats were made on behalf of James Crandall on Gail Willars and her son's life while Gail was in jail and her child was with her husband's friends.

d. Jurors saw Crandall, only after he lost nearly a hundred pounds and looked like a weakling. They never way him as he was at the time of the killing, a 265 pound husky man. James Crandall was subdued by the jailers on numerous occasions. The District Attorney commented to the jury on how puny the man was. Since Mr. Crandall has been incarcerated, it is believed that he killed an inmate. Willars had more than enough reason to fear James Crandall.

Willars is caught in a trap that no one in this country should have to suffer. The court's state that Willars competent attorney should have filed a Motion to Sever so that Willars could present her defense. The court would recognize any failure to file a motion to sever as incompetent yet this attorney was not incompetent.

C. ZACHARY WILLARS TESTIMONY - INCOMPETENT TO TESTIFY

The only evidence that Gail Willars might have any intent to kill or inflict great bodily harm of Parr was presented by her son, Zachary Willars. Zachary was eight at the time if the killing and one month from ten at the time of trial. A competency hearing was held, however, counsel was not allowed to ask questions, denying defendant the right to confrontation. The judge concluded as follows:

> "Based upon the child's overall demeanor, the fact that he did not appear to have been coached, and his good grades in school, the court found Zachary to be an intelligent child who was competent to testify.

Two hours of testimony review is coaching.
Problems with Zachary's testimony:

1. He believed his mother was responsible for is father's death. He witnessed his mother performing CPR on his father and thought she was hurting him.

2. The child's witnessing of his father's death caused severe emotional trauma. Such problems were documented by psychological records from Charter Hospital in Kingwood, Texas. (The same documents Raley refused to submit to the court.)

3. Testimony was presented that several people including James Bullers, District Attorney, Mr. Gray from the District Attorney's office and two Chicago Police officer met with Zachary for 2 hours the day before his testimony and went over his testimony with him. Zachary testified that they gave him some writings to read.

There was testimony at trial that Zachary may have been coached while on the witness stand. Mr. Evans, one of lawyers, and Joan Carroway, Clerk of Court testified that he saw Zachary mouthing something and it appeared that he was communicating with someone in the audience. For quotations, see above grounds for Post Conviction Relief. Also, attached hereto is a portion of the transcript with said testimony.

Mr. Evans, an attorney testified

P. 185, line 11

"Your Honor, I was watching Zachary testify real closely. When he..Mr. Stinson asked him specifically what day, he looked at the lady right there and asked her what day and she told him Monday.

The big problem with this is one of the items Judge Drew was impressed with by Zachary was his ability to say "Monday February the eleventh..."

Deputy Lewis testified that Zachary was moving his lips. Prior to the hearing to determine competency of Zachary Willars, Mr. Evans, Robert Raley's co-counsel asked that the hearing be either in Judge's chambers or in the presence only of defendants and counsel in order to eliminate intimidation factors. The judge denied that request. Zachary testified that he made good grades when in fact he had to have stayed behind a grade in school. Zachary was close to ten on the date of trial, yet he was entering 4th grade. Zachary started school when he was six and should have been in the 5th grade. A reading of the transcript will show that Zachary made many conflicting statements. Zachary's account of what happened is not consistent with Dr. George McCormick (the coroner)'s findings. Dr. McCormick's findings are in line with Gail Willars' testimony.
Further investigation would have shown that Zachary was in special education classes.

Gail Willars was trapped in jail, with a court appointed attorney who refused to collect the information and subpoena the witnesses that could have saved her from a life sentence.

Zachary testified that he could see every thing from where he was sitting in the bathroom. When the judge did not allow the jury to view the room, Gail Willars was denied the right of cross-examination. The statement made by Zachary that "he saw it with his own eyes" would have been refuted by the jury viewing the room. The district attorney suggested viewing the room and Raley objected.

D. VIOLATION OF RIGHT TO CONFRONTATION

During the competency hearing, Raley requested the ability to ask Zachary questions. That request was denied by the judge.

E. DENIAL OF RIGHT TO A SPEEDY TRIAL

Willars was denied a right to a speedy trial. One of the reasons Willars sought a severance was because the trial was constantly being continued because of actions of James Crandall. Essentially, her case was put on hold while Robert Raley and Jim Bullers ran for office. Jim Bullers ran for District Attorney and Raley ran for Judge.

The record will reflect that Willars and Crandall were arrested on August 30, 1989 indicted on September 5, 1989, On April 10, 1990 Raley asked that the D.A. be required to move for severance, hearing was set for April 11, 1990, and Crandall was granted a Motion for Continuance and Jury selection began on February 12, 1991, one year and six months after their arrest.

F. COMMENT ON EVIDENCE NOT IN RECORD
DENIAL OF RIGHT TO CONFRONTATION AND
DUE PROCESS OF LAW

It was error for the District Attorney to comment on evidence which had not been introduced into trial in his closing argument. There was a remark about the fight and the unliklihood

of Crandall subduing Parr by himself. Crandall weighed 280 lbs and was 6'3" at the time of the killing, but by the time the case sent to trial, Crandall was down to 195 lbs, thin and had tried to commit suicide many times. The jury had the impression that at the time of Parr's death, Crandall was thin and weak, while in fact he was a 280 pound husky strong man. The prosecution was appealing to the prejudice of the jury.

13. All grounds were previously submitted.

14. Do you have any petition or appeal now pending in any court, either state or federal? No - not that I know of.

15. Give the name and address if know, of each attorney who represented you in the following stages of the judgment attacked herein.

    a. At preliminary hearing - Robert Raley, Attorney at Law, 290 Benton Road, Bossier City, Louisiana
    b. At arraignment and plea - Robert Raley
    c. At trial - Robert Raley
    d. At sentencing Robert Raley
    e. On appeal - Jimmie Brumfield and Arax Brumfield
    f. In any post conviction proceeding - Arax Brumfield and Jimmie Brumfield, P. O. Box 4108, Baton Rouge, Louisiana 70821.
    g. On appeal from any adverse ruling in a post-conviction proceeding. Arax T. Brumfield, P. O. Box 4108, Baton Rouge, La. 70821.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same count and at the same time? No.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attach? No.

18. A certified copy of the entire record will be filed as soon as it is received. I have copies of everything, but all certified copies were submitted to the various state courts.

Wherefore, petitioner prays that the Court grant petitioner relief to which she may be entitled in this proceeding.

S/Gail S. Willars
GAIL S. WILLARS
Petitioner

S/Arax T. Brumfield
ARAX "RENEE" BRUMFIELD
Attorney at Law
La. Bar No. 03594
P. O. Box 4108
Baton Rouge, La. 70821
(504) 292-6151

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GAIL S. WILLARS * DOCKET NUMBER

VERSUS * MAGISTRATE NO. _____

STATE OF LOUISIANA,
LOUISIANA ATTORNEY GENERAL
AND LOUISIANA CORRECTIONAL
INSTITUTE IN ST. GABRIEL,
LOUISIANA

EXCERPTS FROM
BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

MAY IT PLEASE THE COURT:

Petitioner desires to reassert all claims argued in her Louisiana 2nd Circuit Court of Appeals briefs, Writ to the Louisiana Supreme Court and Petition for Rehearing to the Louisiana Supreme Court.

.....

One of the most serious errors committed by Robert Raley was his refusal to introduce Psychiatric Records from Charter Hospital of Kingwood both for the Judge's consideration in deciding Zachary Willars' fitness to testify and for the Jury to consider in determining the reliability of his testimony.

PSYCHIATRIC AND SOCIAL INFORMATION

ON ZACHARY WILLARS.

The records from Charter Hospital of Kingwood on Zachary Willars were in the possession of Robert Raley. Raley refused to submit these records. Refusal of Counsel, Robert Raley to submit the records from Charter Hospital of Kingwood on Zachary Willars although they were in his possession to the Judge when the Judge was deciding if Zachary Willars was competent to testify and to the Jury for their consideration was a critical error which cost Willars her freedom. Had the judge reviewed the records, it is doubtful that he would have found Zachary competent to testify. Had the jury been presented with the records, it is doubtful that Gail Willars would have been convicted of 2nd Degree Murder. This error was deliberate on his behalf. It wasn't part of Raley's master plan to achieve freedom for Willars.

The records will reflect the following:

Zachary Willars was admitted to Charter Hospital of Kingwood on May 4, 1998 and discharged June 67, 1988 (months prior to the death of Charles Parr. The report verified that both Zachary Willars and Gail Willars were admitted to Charter Hospital of Kingwood, Zachary for psychiatric problems and Gail for a drug addiction problem.

The psychological assessment of Zachary Willars concluded that the patient had "severe psychopathology" and that "most likely the patient had a traumatic stress disorder." with very significant anxiety. Dr. Williams felt that the anxiety was hampering his ability to cope, including his intellectual capacity. But for Zachary's emotional disturbance, he might be capable of functioning atleast in the "dull average range."

Dr. Williams concluded that Zachary "had at some level held his mother responsible for his father's death...".

Dr., A. Khushalani, M.D. recommended the following for Zachary's aftercare:

> "In view of the multiple developmental deficits Zachary has, he probably needs a structured school placement in the future and individual attention."

> C. Sue Williams, Ph.D. conducted a Psychological Evaluation on Zachary on 5-10-88. Zachary was noted to have a speech impediment and his full scale IQ was 71, (borderline intelligence). Zachary was fund to be able to function in the average to dull average range for immediate attention, abstract reasoning, visual-spatial analyses and attention to visual detail. He showed severe deficits in tasks requiring verbal expression, comprehension and sequencing.

> The Rorschach Inkblot test showed that Zachary had "adequate productivity but very poor quality" on the Rorschach Inkblot test. "He has loose contact with reality and very little ability to respond in an age appropriate manner when mildly stressed.

Dr. C. Sue Williams went on to report that:

"He demonstrates very little social interests or understanding and appears to be preoccupied in a world of his own. The content of his stories is somewhat aggressive and is also quite fearful. He is preoccupied with death as noted in Rorschache..."

"DIAGNOSTIC CONSIDERATIONS: The results of this psychological evaluation indicate very severe psychopathy in this individual. Given his history, it is likely that there is traumatic stress disorder with very significant anxiety. At this time it is likely to be hampering all abilities to cope, including his intellectual capacities. It is my impression that Zachary may be capable of functioning atleast in the Dull Average Range were it not for his disturbances."

The Psychological Assessment was conducted and reported by Rosemary Nichols, M.S.W., C.S.W. on 5/13/88. At the time of admission to Charter Hospital of Kingwood, Zachary was seven years old with behavior problems, which worsened since the accidental death of his father in November of 1987. Zachary's maternal grandmother has been in and out of psychiatric hospitals for alcoholism and depression. His mother, Gail Willars has been in and out of therapies since she was eight years old. Prior to hospitalization at the age of seven, Zachary was a kindergarten student at Baptist Temple of Houston. Gail reported

that at school, Zachary was oppositional with teachers and would not do any work.

Zachary's father was killed when a tractor jackknifed and fell on him. Gail tried unsuccessfully to administer CPR. Zachary personally observed these events. At first, Zachary accused his mother of killing his father because he thought she was hurting him when she administered CPR.

The psychological; assessment referred to Gail's experiences with a man who use to be a friend of her husband's. (James Crandall). Gail reported that she became suspicious of this man after a series of "frightening experiences" These frightening experiences escalated to the point where Zachary's mother began receiving phone calls, which threatened her and her son's life. Gail Willars thought that people tried to kill her by running her off the road when she was driving her car. Gail Willars believed that the man that she was involved with was interested in obtaining the money Gail received as a result of her husband's death, and that these incidences were all part of his plan to acquire her money.

Rosemary Nichols, M.S.W., C.S.W.,'s clinical impression of Zachary Willars was as follows:

"This appears to be a family in which there is a history of intergenerational psychiatric problems which are compounded by the most recent psychological trauma of patient's father's accidental death."

Zachary was seven when admitted to Charter Hospital in May of 1988, some six months after the death of his father in November of 1987. At that time, Gail Willars had begun an unhealthy relationship with James Crandall. Gail was suspicious and afraid of Crandall, but fear is often as effective a glue as love.

The killing of Parr occurred August 20, 1989, only months after Zachary's release from Charter Hospital At the time of the killing, Gail Willars, Zachary Willars and James Crandall were living from "pillar to post". Zachary was not in a stable environment essential for his mental condition to improve. His condition only worsened. Parr's death was a super traumatic event.

Zachary witnessed Crandall's murder, was traipsed across country in the dead of night, witnessed his mother's arrest, forced to live with strangers, and was questioned by authorities. The authorities use of leading questions added to the trauma of

Zachary Willars. Two years later, Zachary at the age of nine was called to testify against his mother.

As the years went by, Zachary has lived from foster home to foster home, group home to group home. Attempts have been made to correct his psychological problems. His progress (or lack thereof) has been documented over the years.

A Diagnostic Evaluation of Zachary was conducted by the Reiss-Davis Child Custody Center, 3200 Motor Avenue, Los Angeles, California in June and July of 1996. Zachary was referred for evaluation by DCFS in Cook County, Illinois for intensive psychotherapy and appropriate school placement. The Psychiatric Evaluation form completed by Dr. Van Dyke DeGola, MD documents the following behaviors.

"...B Impulsivity
(1) Acts before thinking
(2) Talks excessively.
...
(7) Trouble waiting turn...
C. Hyperactivity...
(2) Can't sit still
...
D. Mood...
(2) Depressed
(3) Irritable
...
(6) Poor concentration
...
(13) Fatigue/weakness

...

E. Anxiety
   (1) Excessive worrying
   (2) Fears problems

...

F. Psychosis...
   (2) Delusional/grandiosity

   (3) Aggressiveness to peers

   ...

   (7) Lying

   ...

   (9) Animal Cruelty

Reading the trial testimony, the transcripts of the termination of Parental Rights hearing and the Diagnostic evaluation of 1997 demonstrate a number of different and conflicting stories by Zachary Willars concerning the death of Parr. Zachary's account of the events leading up to and surrounding Parr's death are unreliable due to his many psychological, emotional and developmental problems. Dr. Van Dyke De Gola recognized that Zachary Willars had a problem with lying.

Zachary's testimony was most damaging against Willars, but was absolutely unreliable. The Judge and Jury were not presented with the documentation necessary to evaluate Zachary and the reliability of his testimony. The defense counsel doomed

Gail Willars to life in prison. Robert Raley did not introduce the medical information from Charter of Kingwood Hospital or make any effort to defend their client.

...

PROSECUTION'S IMPROPER COMMENT ON THE EVIDENCE

It was error for the District Attorney to comment on evidence which had not been introduced as evidence in his closing arguments. There was a remark about the fight and the unlikelihood of Crandall subduing Parr by himself. Crandall weighed 280 pounds and was 6'3" tall, but by the time the case went to trial, Crandall was down to 195 pounds, thin, tired and tried to commit suicide many ties. The jury had the impression that at the time of Parr's death, Crandall was thin and weak, when in fact he was strong and weighed 280 pounds and was a better than even match for Parr.

> Below are excerpts from the prosecution's closing statements, the last words the jury hears before deliberations.
> page 1442, line 5
>
> "You have to remember that for the -- especially the victim, and there are two victims in this. I agree with Mr. Raley. I disagree with whom they were. Certainly it was a time of terror on Mr. Parr, who lost his life. Of course the other victim in this case was Zachary, not his mother,

but Zachary who had to be exposed to this. That was a brave youngster that testified in front of you."

Page 1448, line 23

"If she worried about Zack, why didn't she tell them to call the police right then? That was her time to get out of it. If that was a big mistake that's where you get out of it. As long as she keeps--she blames this all on Zack. That's a most horrible deplorable thing that I have seen in this case. That poor child victimized by his mother.

page 1453, line 5

"If she cared anything about Zachary, she would have left him in Houston. She only cares about herself. Look what she put that poor boy through."

page 1453, line 14

"The only thing the defendant can dispute is what happened in the room, because everything else is locked in. So thats why I sat thats the key, what was the intent. Don't be fooled. Don't get the wool pulled over your eyes by her up here crying through this testimony. It was touching at first. She could keep questions about minor things here and there and she could keep crying. Where was her concern for Zachary back there. All this concern and emotion now? Where was it when she was taking that poor little boy around in these sleazy motels with James Crandall? She wants you to feel sorry for her now? What about Zachary?

Page 1455, line 7

"She didn't want to do a dog gone thing but get away from there with Crandall. That's all she ever wanted. She didn't care about Zachary. If she would have cared about Zack, she would have left him in Houston.

Page 1455, line 32

"She could have saved a man's life. She chose not to and used her son; blames it on him. Oh! I was worried about him.

La. Code of Criminal Procedure Art. 774 deals with the scope of argument.

"The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.

The argument shall not appeal to prejudice.

The state's rebuttal shall be confined to answering the argument of the defendant."

All errors argued deal with Erroneous Interpretation or Application of Constitutional laws and/or Gross Departure from proper Judicial Proceedings

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Filed April 16, 1998

GAIL S. WILLARS CIVIL ACTION NO. 97-0693

versus JUDGE STAGG

ATTORNEY GENERAL FOR THE
STATE OF LOUISIANA, ET AL.

MAGISTRATE JUDGE PAYNE

REPORT AND RECOMENDATION.

INTRODUCTION

Gall S. Willars ("Willars" or "Petitioner") was convicted of second degree murder by a Bossier Parish jury. A motion for appeal of the 1991 conviction was filed but a return date was not set and the appeal did not go forward. Willars later filed an application 'for post-conviction relief. The trial court addressed the application by granting Willars an out-of-time appeal. The state appellate court affirmed the conviction and sentence. See State v. Willars, 661 So.2d 673 (La. App. 2d Cir. 1995). Willars petitioned the Supreme Court of Louisiana but her writ was summarily denied. She now applies for federal habeas relief.[1]

[1]This petition was filed after April 24, 1996, the

Effective Date of the Antiterrorism and Effective Death Penalty Act*("AEDPA")* . Accordingly, the standards of review set forth therein are applicable to the extent that they change pre-AEDPA habeas law. Lindh v. Murphy, U.S. , 117 S.Ct. 2059 (1997); Green v. Johnson, 116 F.2d 1115 -(5th Cir. 1997).

VOLUNTARILY DISMISSED CLAIMS

Willars raised some issues on direct appeal that had not been addressed at trial. Because the allegations required additional evidence for resolution, the appellate court advised Willars that her remedy was to seek post-conviction relief and an evidentiary hearing. Willars, 661 So.2d at 681. Willars filed an application for post-conviction relief on those grounds and others but filed this federal habeas petition before she exhausted her state court remedies on the issues. After this court notified her of the problems stemming from her lack of exhaustion, Willars voluntarily dismissed the claims that her appointed counsel was ineffective because (1) he refused her requests to file motions for speedy trial and for severance, (2) he had a conflict of interest because Willars refused to sign over to him her book rights, and (3) counsel was overheard apologizing to the victims' son for representing Willars and saying she got what she paid for, nothing.

See Docket No. 20. Her other claims will be addressed below.

SPEEDY TRIAL

Willars claims that she was denied a speedy trial. She was indicted on September 5, 1989, and her trial began on February

11, 1991, approximately seventeen months later. A federal habeas court determines whether there was an undue delay between charging and trial by applying the balancing test of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972) based on the following factors: (1) the length of delay, (2) the reason for delay, (3) the assertion of the speedy trial right, and (4) prejudice to the accused. See also, Cowart v. Hargett, 16 F.3d 642, 646 (5th Cir. 1994), cert. denied, 513 U.S. 886, 115 S.Ct. 227 (1994)

The Louisiana Second Circuit Court of Appeal, which issued the last reasoned state court opinion on the issue, noted that several continuances had been granted to Willars' co-defendant, who sought a sanity commission, and that some delay was also necessary because several attorneys involved in the proceedings, including Willars' counsel, were candidates for public office in the fall of 1990. The court further noted that Willars did not file a motion for speedy trial or a motion to quash. Finally, Willars did not articulate any impairment to trial preparation or other prejudice caused by delay.

The record shows that there were valid reasons for the moderate delay. Willars never asserted her right to a speedy trial prior to her appeal (although she blames this on her trial counsel).

Most importantly, she has failed to show any prejudice caused by the delay. She merely argues that the delay could have caused her son, who testified against her, to forget (unspecified) details that would have cleared Willars. She adds that her son was living during the time with people who had the opportunity to "poison" the boy against his mother. Such speculation does not warrant habeas relief

SUFFICIENCY OF THE EVIDENCE

Standard of Review

Willars next challenges the sufficiency of the evidence to support her conviction. In evaluating this claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2789 (1979) (emphasis in original).

This court's review of the state court's application of the Jackson standard is subject to the deferential standards established by the AEDPA. The AEDPA provides that a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated

"on the merits"[2] in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
>
> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

2The Jackson claim was adjudicated in state court "on the merits" See Green v. Johnson, 116 F.3d 1115, 1121 (5th Cir. 1997)
(resolution on the merits refers to whether disposition was substantive or procedural).

28 U.S.C. -2254(d) (emphasis added). The Fifth Circuit instructs that mixed questions of law and fact, such as a Jackson claim[3], are analyzed under the italicized clause of subsection (d) (1). v. Johnson, 97 F.3d 751, 767-68 (5th Cir. 1996) cert. denied, U.S. , 117 S.Ct. 1114 (1997). Accordingly, a federal court may grant habeas relief for evidence insufficiency only if it determines that the state courts have unreasonably applied the Jackson standard to the facts of the case.

An application of law to facts "is unreasonable only when it can be said that reasonable jurists considering the question

would be of one view that the state court ruling was incorrect." Drinkard at 769. "If reasonable jurists could disagree, the state court decision on a mixed question of law and fact ... is immune from federal habeas attack." Williams v. Cain, 125 F.3d 269, 277 (5th Cir. 1997). When reviewing the state court decision, the federal court should take into account the care with which the state court considered the issue. A "responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment." Gomez, 106 F.3d at 199. **The Evidence**

Petitioner was convicted of second degree murder, which La.R.S. 14:30.1A(1) defines as the killing of a human being when the

---

3 A Jackson claim presents a mixed question of law and fact.
Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir. 1997), light of Lindh, U.S. , 118 S.Ct. 37 (1997).

offender has a specific intent to kill or to inflict great bodily harm. Specific intent exists when the circumstances indicate that the offender actively desired the criminal consequences to follow her act. La.R.S. 14:10.

The Second Circuit conducted a thorough review of the evidence, which showed that Willars, along with James Crandell and Willars' eight year old son, Zachary, were living in the Beacon Manor Motel in Bossier City in the Summer of 1989. When they ran short of money, Willars arranged with Charles Parr to have sex with him in her motel room in exchange for money. Crandell and young Zachary, who were supposed to have left the room, were actually hiding in the bathroom. When an argument between Willars and Parr began, Crandell came out of the bathroom and hit Parr across the back with a stick. A fight ensued which stopped when Crandell produced a knife. Crandell then tied Parr and put him in a closet. Parr eventually escaped and another fight began. Crandell then hit Parr over the head several times with a cast iron frying pan, and dragged him back into the closet. Willars and Crandell wiped the blood from the room and removed the blood stained sheets from the bed. They loaded their belongings into Parr's car and drove to Chicago where they stayed with the Alders family. Motel employees found Parr's body in the room. An autopsy showed that Parr died from heart failure linked to swelling of the brain that was caused by blows from a blunt instrument. Police arrested Willars and

Crandell in Chicago, where they found several of the victim's belongings.

Zachary testified at trial that when Crandell jumped out of the bathroom with a knife, Willars hit Parr on the head with a stick. Zachary also testified that Willars gave the frying pan to Crandell, which he used to hit Parr on the head. At that point, Willars closed the bathroom door and Zachary could not see anything more.

Analysis and Conclusion

After finding these and many more detailed facts, the Second Circuit found that there was sufficient evidence under the Jackson standard to support a second-degree murder conviction. Its application of the Jackson standard was not unreasonable. The appellate court issued a reasoned opinion that articulated the proper legal standard, carefully reviewed the testimony of the relevant witnesses, took into consideration Petitioner's arguments, and reached a sound conclusion that is supported by the record. See State v. Willars, 661 So.2d at 677-80. Reasonable jurists would not be of one view that the decision was incorrect so the conviction is immune from habeas attack on this issue.

PROSECUTOR'S CLOSING ARGUMENT

Willars complains that the district attorney made reference in his closing argument to facts that were not introduced in evidence. Specifically, she complains that the prosecutor commented that

7

Zachary was a victim of his mother's criminal behavior, and that there was a remark about the unlikelihood of Crandell being able to subdue Parr alone. Petitioner alleges that Crandell weighed about 280 pounds at the time of his arrest but by trial was down to 195 pounds. Willars argues here, as she did in the state court, that the comments violated La.C.Cr.P. art. 774 regarding the scope of closing. The state court found no merit in the argument. Id. at 683.

Only federal constitutional violations, not state law errors, warrant habeas relief. Misconduct by a prosecuting attorney in closing arguments does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause. Petitioner must demonstrate that the misconduct was persistent and pronounced or that the

evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks. Jones v. Butler, 864 F.2d 348, 356 (5th Cir. 1988), cert. denied, 490 U.S. 1075, 109 S.Ct. 2090 (1989). Willars has not come close to making such a showing.

IMROPER JURY INSTRUCTIONS

Willars argues that the trial court (1) did not explain to the jury the burden of Proof in cases based on circumstantial evidence and (2) gave confusing instructions on the issue of manslaughter.

The Second Circuit found both of these arguments to be without merit. The appellate court found that (1) the trial court did instruct the jury about both direct and circumstantial evidence (Tr. 564) and (2) the instruction on manslaughter conformed to the statutory language defining the offense (Tr. 567-68).

In response to jury inquiries, the trial court twice repeated the instructions regarding first and second degree murder and manslaughter. (Tr. 577-85) Willars argues that because the jury requested repeated instructions they must have been confused. That is one inference that could be drawn. Other equally plausible inferences are that the jury wanted to be certain that it was faithful

to the instructions, or that the repeated instructions resolved any possible confusion.

When faced with a challenge to a jury instruction, the question for a federal habeas court is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 1737 (1977) (internal citations omitted); Kinnamon v. Scott, 33 F.3d 462, 465 (5th Cir. 1994), cert. denied, 513 U.S. 1054, 115 S.Ct. 660 (1994). Petitioner has not established a claim under this standard.

Willars also argues that the jury should have been required to specify the particular secondary crime that she was committing at the time Parr was murdered. She argues that if she intended merely to commit prostitution (a misdemeanor), and not robbery, that she is not guilty of felony/murder. As the state court found, the facts warrant a conclusion by the jury that an intent to commit robbery existed at the time the fatal blows were struck. Willars, 661 So.2d at 683. Also, the conviction for second degree murder was appropriate if the jury found that Willars had specific

intent to kill or inflict great bodily harm upon Parr. The facts warrant that conclusion as well.

ZACHARY WILLARS: COMPETENCE AND CONFRONTATION

Petitioner's son, Zachary, was eight years old at the time of the murder, and was nine years and eleven months old at the time of trial. He provided direct evidence against his mother by testifying that he saw her hit Parr in the head with a stick and later hand Crandell the frying pan. (Tr. 163-64) Willars claims that the trial court erred by admitting Zachary's testimony because he was not competent to testify due to learning and emotional problems.

The habeas review standard applicable to witness competence issues is the same as that applied to the admission of evidence: Was the state court's evidentiary ruling sufficiently egregious to render the trial fundamentally unfair or violate an explicit

10

Constitutional right. The role of the federal court is not to determine whether Zachary was a competent witness under state law, but whether his testimony "was so grossly unreliable that, viewed in the context of the entire trial, it infected and fatally

undermined the reliability of [Willars'] conviction." Peters v. Whitley, 942 F.2d 937, 940 (5th Cir. 1991), cert. denied, 502 U.S. 113, 112 S.Ct. 1220 (1992). A federal court, in making that examination" is highly dependent upon state court findings of subsidiary facts pertinent to competency. Id.; 28 U.S.C. ~2254(d)(2).

The trial judge conducted a competency hearing outside the presence of the jury. Zachary told the judge that he was in the third grade, made good grades and enjoyed math, spelling and reading. He said that knew the difference between telling the truth and telling a lie, explaining that, "A lie is something that gets you in trouble. The truth can help you." Zachary was able to recall the name of the airline on which he had flown into town, and confessed that he did get a poor grade in conduct on his last report card. The trial court continued to engage in a very careful and thorough colloquy with Zachary about the difference between the truth and a lie, with Zachary responding appropriately to each question. Zachary also denied that anyone had told him what he should testify about in court. (Tr. 148-54) After argument from counsel, the trial judge found that:

> Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that this is an intelligent child, and I think considering his age, I certainly think he's competent to testify, and I will so rule at this time, noting error being assigned by both counsel.

(Tr. 155) The Second Circuit reviewed this record as well as a 1988 psychiatric assessment of Zachary that was not admitted at trial. The assessment indicated that Zachary had behavioral problems at school after the death of his father, but contained no indication of any thought disorder or that Zachary's memory was impaired. Considering all of these facts, the appellate court upheld the trial court's decision that Zachary was a competent witness. This court agrees.

The factual findings made by the trial court and affirmed on appeal are well supported by the record. The transcript shows that when Zachary later testified he gave articulate, direct and responsive answers to the many questions that were asked of him. As for alleged coaching by the prosecution and by a trial spectator, the trial judge conducted a thorough inquiry into these issues (Tr. 185-201) and the defense conducted a vigorous cross-examination of Zachary (Tr. 201-10) This court sees nothing in the record that would permit it to hold that the trial court's decision of these factual issues was "based on an unreasonable

determination of the facts in light of the evidence presented" in the state court. See 28 U.S.C. ~2254(d) (2).

Willars also argues that the trial court denied a request by her counsel to ask Zachary questions during the competency hearing. This argument is unsupported by the record. After the trial judge conducted his examination, he asked if any of the defense counsel had any questions or issues that they would like to be explored. Willars' counsel said that he would like to hear further explanation from Zachary about the difference between a truth and a lie. The court obliged by asking follow up questions of Zachary on the issue and carefully explaining to him his obligation to tell the truth. (Tr. 151-53) During the argument on the issue, Willars' counsel said that there were some (unspecified) things that should have been included in the competency hearing but were not. The trial court advised counsel that if he wanted to list those things that should have been asked, that he should do so immediately. (Tr. 156-57) There is no indication that counsel ever provided that list but he was permitted to conduct a thorough cross-examination of Zachary. These facts do not give rise to a Confrontation Clause violation.

TESTIMONY OF ROBERTA ALDERS

Willars complains that, despite a pretrial ruling, witness Roberta Alders testified that Willars and Crandell told her that

they had come to Chicago because, "they had to kill a man and were running from the law". (Tr. 141) The trial court had granted a defense request to exclude the statement because the state did not

timely notify the defense of the statement during discovery. Once the statement was made at trial, however, defense counsel did not object or request an admonishment. The Second Circuit refused to review the issue because of the lack of a contemporaneous objection. Willars, 661 So.2d at 683-84. In response to this issue, the state merely cites the pages of the transcript, at which Alders' testimony appears and says that, "The court's evidentiary rulings pertaining to Alders' testimony were correct."

It is not clear from the State's response whether it relies upon the procedural default as a defense. The law does not require but may permit the court to raise the procedural default sua sponte. Trest v. Cain, U.S. , 118 S.Ct. 478 (1997). To the extent that the court is permitted to raise the defense, these facts warrant its application. Furthermore, this one piece of evidence did not alone so infect the proceedings as to amount to a constitutional violation. There was no lack of additional evidence

to prove that the defendants had left town after killing a man.

SEVERANCE OF THE CO-DEFENDANTS

Procedural Bar

Willars complains that an oral motion to sever was denied. The Second Circuit found no written motion in the record. It noted that the issue had been raised during a hearing on Crandell's Motion for a Continuance. The trial court granted a continuance to both defendants, implicitly denying a severance. The Second

Circuit found that the issue was waived for lack of contemporaneous objection. Willars, 661 So.2d at 682. The state has not raised the procedural default in this court. It merely argues that to the extent the motion to sever was urged that the court did not abuse its discretion in denying the request. This court should, sua sponte, apply the procedural bar. Alternatively, as set forth below, the claim should be denied for lack of merit. Lack of Merit

Severance is within the discretion of the trial judge and is required only in cases of compelling prejudice. Breeland v. Blackburn, 786 F.2d 1239, 1241 (Sth Cir. 1986) "The burden of demonstrating prejudice is a difficult one, and the ruling of the

trial judge will rarely be disturbed by a reviewing court." Id.; Procter v. Butler, 831 F.2d 1251, 1256 (5th Cir. 1987), cert. denied, 488 U.S. 888, 109 S.Ct. 219 (1988).

Willars argues that her defense was prejudiced because the joint trial prevented her from attacking the character of co-defendant Crandell, on whom she sought to blame the entire matter. Crandell's counsel filed a pretrial motion in limine to prevent Willars from presenting evidence of Crandell's bad character and other crimes. Willars' counsel argued that he should be able to present evidence of the relationship between Willars and Crandell and how that relationship affected Willars' intent and mental state. (Tr. 5) The trial court ruled that Willars could not testify merely for the purpose of showing the bad character of

Crandell, but Willars could give testimony "explaining her situation and explaining her side of the case. The court went on to say:

> And for one thing, the remedy in a situation like this normally would be a severance. Short of a severance, which I don't think either defendant wants, short of a severance, I don't know what else to do but allow her to tell the story. And I will give her the -- the appropriate limiting and cautionary instructions later.

The motion in limine was denied. (Tr. 9) Willars has failed to

articulate any facts that she was prevented from introducing as a result of that ruling. Absent articulation of facts that constitute compelling circumstances, this court cannot find that the trial court abused its discretion with respect to the severance issue.

INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective Assistance of Counsel and the AEDPA

Petitioner bears the burden of proving two components, deficient performance and prejudice, to establish ineffective assistance of counsel. Counsel's performance was "deficient", only if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 104 S.Ct.2052, 2064 (1984). Counsel's acts must fall beneath an objective standard of reasonable professional assistance. Gray v. Lynn, 6 F.3d 265, 268 (5th Cir. 1993). The court must give great deference to counsel's assistance and strongly presume that counsel exercised reasonable professional judgment. Id. Prejudice exists only if there is a reasonable probability that, but for the error, the result of the trial would have been different. A

reasonable probability is one sufficient to undermine confidence in the outcome. Strickland, 104 S.Ct. at 2067.

Under the AEDPA's deferential standard of review, a federal court may not grant a writ of habeas corpus with respect to a Strickland claim that was denied on the merits by the state court unless the state court's adjudication "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d); Williams v. Cain, 125 F.3d 269 (5th Cir. 1997). "If reasonable jurists could disagree, the state court decision ... is not an unreasonable application of federal law, and thus the decision is immune from federal habeas attack." Id.; Carter v. Johnson, 110 F.3d 1098, 1108 (5th Cir. 1997).[4]

When reviewing the state court decision, the federal court should take into account the care with which the state court considered the issue. A "responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the [state court] judgment." Gomez v. Acevedo, 106 F.3d 192, 199 (7th

---

4Carter was later vacated, in light of Lindh, for retroactively applying the AEDPA. See 118 S.Ct. 409. Its discussion of the AEDPA is nonetheless instructive.

Cir. 1997), vacated on other grounds, ___U.S. , 118 S.Ct. 37 (1997) .

The State Court Decision Must Be Upheld

Willars argued in state court and again in this court that her counsel was deficient because he failed to object to the Alders testimony, failed to call available witnesses, did not object to the ruling on Zachary's competency, and did not sufficiently attack Zachary's credibility. The Second Circuit articulated the standard and examined each of these issues in detail. Willars, 661 So.2d at 680-81.[5] This court has examined the treatment of these issues by the state court and finds that the state court did not unreasonably apply the Strickland standard, precluding habeas relief under the AEDPA. See Gomez, 106 F.3d at 199 (a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment).

FAIR AND IMPARTIAL TRIAL

Willars' entire argument on this final issue is that,

reading of the entire transcript, record, briefs and rulings will reflect that Willars was not provided with a fair and impartial trial." See Petition, p. 21. Although it is not clear that this "issue"

has been exhausted, the court finds that it is without merit. See 28 U.S.C. ~2254(b) (2) (application may be denied on the merits notwithstanding the failure to exhaust state remedies).

5The state court's treatment of these issues is not restated herein for the sake of brevity.

Accordingly,

IT IS RECOMMENDED that the petition for writ of habeas corpus be DENIED, and that the complaint in this action be DISMISSED WITH **PREJUDICE.**

Objections

Under the provisions of 28 U.S.C. ~636(b) (1) (C) and Fed. R.Civ. P. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R.Civ. P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed

findings, conclusions and recommendation set forth above, within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed factual findings and legal conclusions accepted by the district court. See Douglas v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 16th day of April, 1998.

Roy S. Payne
ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 4-16-98
BY CM
TO Brumfield
Bullers
Stagg w/file

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

GAIL WILLARS CIVIL ACTION NO. 5:97CV0693

VERSUS JUDGE STAGG
MAG. JUDGE PAYNE

WARDEN, LA CORRECTIONAL
INST. FOR WOMEN

JUDGMENT

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law, and additionally relying on the recent pronouncement by the Fifth Circuit in Magouirk v. Phillips, 144 F.3d 348 (5th Cir. 1998), definitively holding that a federal habeas court has the authority to raise the issue of procedural bar sua sponte;

IT IS ORDERED that the petition for writ of habeas corpus is DENIED, and that the complaint in this action is DISMISSED WITH PREJUDICE.

THUS DONE AND SIGNED in chambers at Shreveport, Louisiana, this the 4th day of September, 1998.

TOM STAGG
JUDGE TOM STAGG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

GAIL WILLARS — CIVIL ACTION NO. 5:97CV0693

VERSUS — JUDGE STAGG
MAG. JUDGE PAYNE

WARDEN, LA CORRECTIONAL
INST. FOR WOMEN

CERTIFICATE OF APPEALABILITY

A final order having been filed in the above-captioned habeas case, the court, considering the record in this case and the requirements of 28 U.S.C. § 2253, hereby finds that:

X The certificate of appealability is DENIED because the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right.

The certificate of appealability is GRANTED for the below reasons:

The applicant has made a substantial showing that the following issues

s/Tom Stagg
Tom Stagg
UNITED STATES DISTRICT JUDGE

COPY SENT TO
To: COA
Brumfield
Bullers

UNITED STATES COURT OF APPEAL

5TH CIRCUIT

GAIL S. WILLARS NUMBER 98-31043
Appellant

VERSUS

USDC #97-0693

LA. CORRECTIONAL INSTITUTE
FOR WOMAN

MOTION TO CERTIFY APPEALABILITY

TO: The Honorable 5th Circuit Court of Appeals:

NOW INTO COURT, through undersigned counsel, comes and appears Gail S. Willars who with respect represents:

1

A Petition for Habeas Corpus under Article 28 U.S.C. 2254 was filed on behalf of Gail S. Willars in the United States District Court, Middle District Court, but was transferred to the United States District Court, Western District of Louisiana.

3

Plaintiff's writ of habeas corpus was denied by the Honorable Judge Tom Stagg by signing in chambers in Shreveport on the 4th day of September, 1998. The Judgment was entered on

the 8th of September 1998. A timely Notice of Appeal was filed by petitioner.

4

On the 1st of October, 1998, Judge Stagg denied Certificate of Appealability because "the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right."

5

Most if not all issues presented on Petition for Habeas Corpus were on the grounds of denial of Constitutional Rights, as can be seen by the Petition for Writ of Habeas Corpus, Brief in Support of Petition for Writ of Habeas Corpus and the Amended Petition for Habeas Corpus. Magistrate Payne sent notice to the Petitioner that exhaustion of state court remedies had not been completed on some of the allegations and if those allegations were not voluntarily dismissed, the entire Petition for Writ of Habeas Corpus would be dismissed with prejudice. Note that Petitioner voluntarily dismissed those allegations in her Petition for Writ of Habeas Corpus that the Magistrate asserted exhaustion of state court remedies had not been completed.

6

Petitioner alleged in her Petition for Habeas Corpus and Amended Petition for Habeas Corpus that her Constitutional Rights were violated. Such rights are briefly listed as follows and included but are not limited to the following. A detailed assertion of the denial of Constitutional Rights is demonstrated in the Petition for Writ of Habeas Corpus and Brief in Support thereof which has been forwarded to this court by the District Court.

a. Denial of effective assistance of counsel

b. Denial of due process of law by not allowing Willars to sever her trial from her co-defendant. Due process was denied in many other ways outlined in the Petition for Writ of Habeas Corpus.

c. Denial of Speedy Trial

d. Denial of Right to Confrontation

e. Denial of a fair and impartial trial.

7

Petitioner asserts that she has demonstrated a substantial showing of denial of constitutional rights and she is therefore entitled to a Certificate of Appealability.

WHEREFORE, Petitioner prays that this honorable court grant her a Certificate of Appealability.

S/Arax Renee Brumfield
ARAX "RENEE" BRUMFIELD
Attorney at Law
La. Bar No. 03594
P. O. Box 4108
Baton Rouge, La. 7821
(504) 292-6151

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been mailed to Jim Bullers, District Attorney for the Parish of Bossier, P. O. Box 69, Benton, Louisiana.

Baton Rouge, Louisiana this the 10th day of October, 1999.

S/Arax Renee Brumfield
ARAX "RENEE" BRUMFIELD

UNITED STATES COURT OF APPEAL

5TH CIRCUIT

GAIL S. WILLARS NUMBER 98-31043
Appellant

VERSUS

USDC #97-0693

LA. CORRECTIONAL INSTITUTE
FOR WOMAN

EXCERPTS FROM

BRIEF IN SUPPORT OF

MOTION TO CERTIFY APPEALABILITY

By Appellant, Gail Willars

Arax "Renee" Brumfield
Attorney for Appellant
La. Bar no. 03594
P. O. Box 4108
Baton Rouge, Louisiana 70821

(504) 292-6151
(504) 292-6150 (fax)
e-mail arax@brumfield.net

STATEMENT OF JURISDICTION

This matter is being appealed from the denial of a Petition of Writ of Habeas Corpus under 28 U.S.C. 2254 from the United States District Court, Western District of Louisiana.

STATEMENT OF ISSUES

Since this is a Brief in Support of a Petition for Certificate of Appealability, the issue of this brief is whether or not the decision in State Court resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

STATEMENT OF THE CASE

.....

A. Statement of Facts

1) Facts leading up to arrest .....

P. 12 of brief

2) Facts concerning legal proceedings

Trial began on the 11th day of February 1991, nearly two years after Willars and Crandall were arrested. Written Motions

such as Motion for Speedy Trial and Motion to Sever were not filed on behalf of Willars. Raley barely talked to his client prior to trial.

Witnesses were not subpoenaed to testify on behalf of Willars. The following witnesses could have been called to testify but were not:

a. Glenda Adams, a prostituted "tricked" with Parr and could have testified as to the victims mistreatment of prostitutes and that hat Parr normally took his jewelry off before a "trick" and left it in the car.
b. Carolyn Wyatt, a Beacon Manor prostitute could have testified that the frying pan was in the room and Gail used it to cook. It was brought in to be used as a weapon.
c. Zachary's mental condition could have been verified by the Charter Hospital Records.
d. Denise Crandall, Debra Martin and Kathy Blankenship could have testified concerning Crandall's negative control over women.
e. Cellmates of James Crandall could have testified as to Crandall's violent nature and overheard threats to Gail Willars concerning her son.

Willars testified that Crandall struck Parr in the head with a frying pan, but denied vehemently that she intended to commit a robbery, that she intended to inflict great bodily harm on Parr or that she intended for Parr to die. The most damaging testimony against Willars came from her young son, Zachary Willars. Zachary testified that "Mom handed him the frying pan." Willars

denied handing Parr the frying pan. James Crandall declined to testify; however, letters written by Crandall were introduced into evidence without objection by the prosecution denying Gail's involvement in the death of Parr.

On April 10, 1990, Willars' attorney, Robert Raley requested that the trials of Willars and Crandall be severed. The request was denied April 11, 1990.

During the trial, Crandall filed a Motion in Limine resulting in a protective order in favor of James Crandall, prohibiting any evidence of the bad character of James Crandall. Crandall was not to testify. As a result, Willars was precluded from using one of her strongest defenses, the abusive nature of James Crandall which would have validated her reported fear of Crandall. The Court commented:

page 936, line 13 of the record

"THE COURT: All right. So noted, counsel. Then just for the clarity, Madam Clerk, on the Motion in Limine filed on behalf of Mr. Crandall today, while I am instructing Mr. Raley not to seek to elicit testimony from his client merely for the purpose of showing the alleged bad character of Mr. Crandall, I will allow him to elicit the testimony from his client in explaining her situation and explaining her side of the case. So I will deny the request to limit the testimony extended by Mr. Stinson. I'll note that he assigns error to the Court's ruling. And my reasons for my ruling are--are contained in the short

memo that's attached to the outside of the envelope. And for one thing, the remedy in a situation like this normally would be a severance. Short of severance, which I don't think either defendant wants, short of severance, I don't know what else to do but allow her to tell the story. And I will give the--appropriate limiting and cautionary instructions later..."

Gail Willars did request severance, but that request was denied. Then when it came to trial, her co-defendant filed and was granted a Motion in Limine limiting her testimony, the judge held that severance would have been the proper remedy.

The trial began and the prosecution witnesses were called in the normal order of trial.

Ms. Alders testified that Crandall, Willars and Zachary drove to her house after Parr's death, commenting:

Page 1068, Line 10

Q. Now, pertaining to their coming to Chicago, what did they tell
you?

A. They both at separate times said they had to come to Chicago to
Leave Gail's son Zachary with my husband and I because they
Had to kill a man and were running from the law.

That testimony contained suppressed inculpatory testimony. These statements should not have been heard by the jury. Jim Bullers, District Attorney deliberately allowed these

statements to come in knowing that they were suppressed. Mr. Raley should have strongly objected. This in and of itself was a denial of effective counsel to Defendant, Gail Willars. That testimony alone could have convinced a jury to convict Willars of 2nd Degree Murder.

The reason that these statements were suppressed was that Mr. Bullers, the Assistant District Attorney amended his response to discovery on the first day of Jury Selection (February 12, 1991) giving notice that Ms. Alders would recount inculpatory statements made by both defendants. Counsel for Defendant objected to these statements being made in trial and the Judge signed an order on the 13th of February 1991 (prior to Ms. Alders testifying) suppressing any statements made by either of the co-defendants to Ms. Page or Ms. Alders in their case in chief. Defendants had no time to explore the credibility of Alders and Page's statements. The statements were suppressed, yet because of Raley's failure to object the statements were made available to the jury.

The most damaging witness to Willars was her son, Zachary Willars.

Prior to Zachary's testimony, a cursory competency

hearing out of the presence of the jury was held by Judge Drew. This hearing was held without the benefit of the psychiatric records in the possession of Robert Raley, Gail Willars' attorney. A reading of the documents show without a doubt that Zachary was not competent to testify. Had the Judge been presented with these records at the competency hearing, it is doubtful he would have ruled the child competent to testify.

Had the jury been presented with the records, it is doubtful that Gail Willars would have been convicted of 2nd Degree Murder. This error was deliberate act of Raley.

The Charter Hospital 'records will reflect the following:

Zachary Willars was admitted to Charter Hospital of Kingwood on May 4, 1998 and discharged June 67, 1988 (months prior to the death of Charles Parr. The report verified that both Zachary Willars and Gail Willars were admitted to Charter Hospital of Kingwood, Zachary for psychiatric problems and Gail for a drug addiction problem.

The psychological assessment of Zachary Willars concluded that the patient had "severe psychopathology" and that "most likely the patient had a traumatic stress disorder." with very significant anxiety. Dr. Williams felt that the anxiety was

hampering his ability to cope, including his intellectual capacity. But for Zachary's emotional disturbance, he might be capable of functioning atleast in the "dull average range."

Dr. Williams concluded that Zachary "had at some level held his mother responsible for his father's death...".

Dr., A. Khushalani, M.D. recommended the following for Zachary's aftercare:

"In view of the multiple developmental deficits Zachary has, he probably needs a structured school placement in the future and individual attention."

C. Sue Williams, Ph.D. conducted a Psychological Evaluation on Zachary on 5-10-88. Zachary was noted to have a speech impediment and his full scale IQ was 71, (borderline intelligence). Zachary was fund to be able to function in the average to dull average range for immediate attention, abstract reasoning, visual-spatial analyses and attention to visual detail. He showed severe deficits in tasks requiring verbal expression, comprehension and sequencing.

The Rorschach Inkblot test showed that Zachary had "adequate productivity but very poor quality" on the Rorschach Inkblot test. "He has loose contact with reality and very little

ability to respond in an age appropriate manner when mildly stressed.

Dr. C. Sue Williams went on to report that:

> "He demonstrates very little social interests or understanding and appears to be preoccupied in a world of his own. The content of his stories is somewhat aggressive and is also quite fearful. He is preoccupied with death as noted in Rorschache..."
>
> "DIAGNOSTIC CONSIDERATIONS: The results of this psychological evaluation indicate very severe psychopathy in this individual. Given his history, it is likely that there is traumatic stress disorder with very significant anxiety. At this time it is likely to be hampering all abilities to cope, including his intellectual capacities. It is my impression that Zachary may be capable of functioning atleast in the Dull Average Range were it not for his disturbances."

The Psychological Assessment was conducted and reported by Rosemary Nichols, M.S.W., C.S.W. on 5/13/88. At the time of admission to Charter Hospital of Kingwood, Zachary was seven years old with behavior problems, which worsened since the accidental death of his father in November of 1987. Zachary's maternal grandmother has been in and out of psychiatric hospitals for alcoholism and depression. His mother, Gail Willars has been in and out of therapies since she was eight years old. Prior to hospitalization at the age of seven, Zachary was a kindergarten student at Baptist Temple of Houston. Gail reported that at school, Zachary was oppositional with teachers and would not do any work.

Zachary's father was killed when a tractor jackknifed and fell on him. Gail tried unsuccessfully to administer CPR. Zachary personally observed these events. At first, Zachary

accused his mother of killing his father because he thought she was hurting him when she administered CPR.

The psychological; assessment referred to Gail's experiences with a man who use to be a friend of her husband's. (James Crandall). Gail reported that she became suspicious of this man after a series of "frightening experiences" These frightening experiences escalated to the point where Zachary's mother began receiving phone calls, which threatened her and her son's life. Gail Willars thought that people tried to kill her by running her off the road when she was driving her car. Gail Willars believed that the man that she was involved with was interested in obtaining the money Gail received as a result of her husband's death, and that these incidences were all part of his plan to acquire her money.

Rosemary Nichols, M.S.W., C.S.W.,'s clinical impression of Zachary Willars was as follows:

> "This appears to be a family in which there is a history of intergenerational psychiatric problems which are compounded by the most recent psychological trauma of patient's father's accidental death."
>
> Zachary was seven when admitted to Charter Hospital in May of 1988, some six months after the death of his father in November of 1987. At that time, Gail Willars had

begun an unhealthy relationship with James Crandall. Gail was suspicious and afraid of Crandall, but fear is often as effective a glue as love.

The killing of Parr occurred August 20, 1989, only months after Zachary's release from Charter Hospital At the time of the killing, Gail Willars, Zachary Willars and James Crandall were living from "pillar to post". Zachary was not in a stable environment essential for his mental condition to improve. His condition only worsened. Parr's death was a super traumatic event.

Zachary witnessed Crandall's murder, was traipsed across country in the dead of night, witnessed his mother's arrest, forced to live with strangers, and was questioned by authorities. The authorities use of leading questions added to the trauma of Zachary Willars. Two years later, Zachary at the age of nine was called to testify against his mother.

The court ruled that Zachary was competent to testifying noting that:

p. 1082 line 6

"The Court: All right, counsel, cases under the evidence code indicate the court has wide discretion. Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that he is an intelligent child, and I think considering his age, I certainly think he is competent to testify and I will so rule

at this time, noting error being assigned by both counsel."

This child with a history of mental problems was also coached. A reading of the transcript will demonstrate that Zachary was coached prior to the trial. The record will reflect a strong likelihood that that Zachary was coached during testimony. Joan Carroway, Clerk of Court testified that she observed Zachary mouthing to someone in the audience.

Without the report from Charter Hospital, the court had no way of knowing that Zachary had failed kindergarten, that Zachary was in special education, that Zachary felt his mother killed his father or that Zachary had severe emotional problems that would effect the way he perceived things.

Zachary's testimony contradicted the coroner's testimony and it contradicted his own testimony.

Even after Zachary was found to be competent to testify, and even though his testimony was contradictory to the coroner and itself, Raley, Willars' attorney never tried to introduce the records from Charter of Kingwood to demonstrate to the jury that Zachary's testimony was not reliable.

Gail Willars and her father, Mr. Sisco were the only

witnesses called to testify on her behalf even though witnesses could have been called to testify to the following relevant issues:

1. As to Mr. Parr's mistreatment of other women

2. The fact that Mr. Parr normally took his jewelry off and left it in the car when with a prostitute.

3. The fact that the frying pan in the motel room was in the room
prior to the date of the killing. Gail Willars used the pan to cook with. The jury was lead to believe that the pan was recently brought into the room to be used as a weapon.

4. Witnesses could testify that Gail's intent was to commit
prostitution, not robbery.

5. Witnesses could have testified as to Zachary's mental condition.

6. Zachary's belief that his mother killed his father.

7. James Crandall's control over Gail Willars and James Crandall's violent nature.

During closing arguments, Jim Bullers, District Attorney argued facts that were not in evidence, denying Willars the opportunity to cross-examine. During closing arguments, Bullers argued that during the fight it was unlikely that Crandall could subdue Parr by himself. During the trial, Crandall's weight was down to 195 pounds, his appearance was very thin and tired. Crandall had tried to commit suicide several times prior to the

trial. During the killing of Parr, Crandall was a very husky and strong 280 pounds. This type of appeal to the jury was very misleading.

Robert Raley failed to argue for a responsive verdict of Manslaughter during the closing arguments. Because of the lack of direct evidence against Gail Willars and the very nature of her part in the events that transpired that evening, Manslaughter would have been a reasonable responsive verdict.

The Jury Instructions were defective in the following respects:

a. No explanation as to burden of proof in cases based on circumstantial evidence.

b. The jury instructions were confusing as to the issue of manslaughter. The question the jury should have been instructed to ask was "What specific crime was Gail guilty of at the *time* Crandall fatally hit Parr in the head with a frying pan. At that moment, if Gail was not guilty of robbery, then she is not guilty of murder. The jury was never instructed of that option and that failure to instruct is not harmless error.

ARGUMENT

EFFECTIVE ASSISTANCE OF COUNSEL

Willars has argued at all stages of State Court proceedings, that she was denied effective assistance of counsel as required by the 6th and 15th Amendment to the United States Constitution. Denial of effective assistance of counsel is properly plead in Habeas Corpus Proceedings. The United States Supreme Court set the standard for establishing ineffective assistance of counsel in Strickland v. Washington.[ii] 466 U.S. 2052, 80 L.Ed 2d 674 (1984). by establishing a two-prong test.

First the defendant must show that counsel's performance was defective. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution.

The court of appeals in the Willars case acknowledged that the first prong of the two prong test was met by Robert Raley's failure to object to Ms. Alder's testimony concerning any "admissions" Willars may have made. Other errors made by Raley either by themselves or in connection with other errors meet

the first prong of the test, namely, failure to submit the records from Charter Hospital, failure to file motions, failure to call witnesses, cross examining Willars' young son and leading him into testifying against Gail's interests, failure to file formal motion for severance and failure to insist upon severance, failure to call witnesses as listed in the Petition for Writ of Certiorari. One of the most damaging errors was failure to develop Crandall's control over Willars and Willars fear of Crandall, both for herself and her son. Failure to sever the trial made it impossible to adequately develop this defense. This was a case where Willars and Crandall had mutually exclusive defenses. If there ever was a case that required severance, it was this case.

The second prong of the two-prong test set out in Strickland,[iii] supra was that the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. It is clear that the errors made by counsel guaranteed that Willars would be unjustly convicted of 2nd Degree Murder and sentenced to life in prison.

The courts have found ineffective assistance of counsel in

the following:

a. State v. Potter, 92-K-2552, (La. App. 4th Cir, 1/14/93), 612 So. 2d 953[iv]. Failure to interview and subpoena witnesses who would have corroborated defendant's theory of self-defense and failure to argue manslaughter as a responsive verdict.

b. Gray v. Lynn[v], (U.S. Appeal, 5 Cir 10/20/93), 6 F.3d 265. Failure to object to erroneous jury instructions.

c. Chambers v. Armontrout[vi], 885 F. 2d 1318, 1323, Petitioner was convicted of capital murder in state court. The Court of Appeals and Supreme Court affirmed. A petition for Habeas Corpus was filed in Federal District court and was denied. The Court of Appeals reversed holding that Petitioner received ineffective assistance of counsel when counsel failed to call self-defense witness. The court further held that pursuant to Strickland, supra, there was "a probability sufficient to undermine confidence in the outcome."

d. Maddox v. Lord[vii], 818 F. 2d 1058, failure to present witnesses and failure to show emotional problems of defendant met deficiency.

e. Rummel v. Estelle[viii], 590 F. 2d 103 (5th Cir) 1974. Court appointed attorney has duty to interview potential

witnesses and make independent examination of the facts and circumstances, pleadings and laws involved in Criminal Prosecution.

f. Johnson v. Estelle[ix], 704 F.2d 232, No. 82-2033, 5th Cir 1983 A Texas prisoner sought Habeas Corpus claiming inefficient assistance of counsel. Petitioner pled guilty to a homicide, and was given an enhanced sentence of life in prison. Petitioner appealed, but withdrew his appeal upon advice of counsel, upon counsel's mistaken belief that he could be given the death penalty. Petitioner filed a Petition for Writ of Habeas Corpus. The 5th Circuit remanded the case to the district court for an evidentiary hearing.

> "we believe that Johnson's claim of ineffective assistance of counsel, if proven true establishes a clear Constitutional violation..." p. 239

g. Coch v. Lynauch[x], No. 85-1705, 5th cir, 1987

Coch applied for habeas corpus in U. S. District Court. The Petition was dismissed in district and petitioner appealed to the 5th Circuit Court of Appeal. The Court of Appeals remanded the case to district court. The court held that in showing counsel's performance defective, petitioner must show that counsel fell beneath an objective standard of reasonable professional

assistance. After the first prong has been satisfied, petitioner must also show a reasonable probability that but for the counsel's unprofessional errors, the result of the proceeding would be different. Bates v. Blackburn, 805 F. 2d 569 (5th Cir 1986).

h. United States v. Wolfe[xi], 727 F.2d 656 (7th Cir 1983) the court found that failure to interview and call witnesses was ineffective assistance of counsel.

RIGHT TO CONFRONTATION

The judge erred when he disallowed the defense the opportunity to cross-examine Zachary Willars when he had offered the opportunity for the prosecution to "ask questions." There was an opportunity to correct the situation. The judge was in a "hurry". Gail has the rest of her life to contemplate this error in her jail cell.

This error cannot be considered harmless when you consider the following fact. Zachary believed his mother had killed his father. Zachary had and has limited mental and emotional capacity and was and is dysfunctional.

With this erroneous belief deeply ingrained into his physic, Zachary's version was that he "saw" the whole series of events while he was on the commode, in the tub, by the tub, with

his own eyes or through the ever present mirrors. Zachary testified, "Mom and James killed a man." That statement exactly matched Alder's testimony. (Zachary was staying with Alders in the time period prior to trial). Exact matches should face careful scrutiny.

> Zachary testified:
> "Mom handed him a frying pan. Yes. In fact the first time I saw it was when she hit--when James hit the man on the head when Mom handed it to him. (Trials are not suppose to be decided on multiple choice testimony)

The ruling that Zachary was competent to testify so taints these proceedings as to render the result of the proceedings unreliable. The following litany between the judge and the counsel concerning this issue.

> P. 1078 of the transcript
> line 2
>
> "THE COURT: American Airlines? Okay, The -- do any of the attorneys--attorneys desire to ask the witness any questions?
>
> MR. BULLERS: Your honor, I think it would be appropriate for the court to handle that. I think that would be the best procedure.
>
> Taking Mr. Bullers' clue, the court responded as follows:
>
> line 8
>
> " THE COURT: The--do any of the defense lawyers feel that they should be allowed to ask the witness

any questions? I think this is a determination for the court. Is there anything--lets put it this way, is there anything that defense counsel would like me to go into?"

The court was initially going to allow both Prosecution and Defense counsel to question Zachary on the issue of competency. After Bullers commented that it was appropriate for the court to handle, Willars' attorney was denied the opportunity to question Zachary.

The court proceeded to question Zachary some more on the areas that concerned Robert Raley, but that is not the same as Robert Raley being able to examine the witness himself.

" THE COURT: Okay, I'm ready to rule. Anything else to point out? Any argument that you want to be put on the record or maybe while the witness is out getting a drink of water.

line 26

"MR. BULLERS: I was just going to say that his answers were good and showed proper understanding. He said if he didn't tell the truth, he'd be in trouble with the Court, and that is so.

THE COURT: All right. Mr. --

MR. BULLERS: The overall tender of it is that he understands what's going on and is competent to testify.

MR. RALEY: Well, I'm--we're standing on this side of the courtroom, and Mr. Bullers is standing on that side. What I've heard appeared awfully different from he. What I heard was a young child say when asked about

> what the truth is that its something that you're going to get in trouble if you don't tell it. And that might be a collateral consequence. What could be more obvious that the distinction of the truth and the non-truth is accuracy. And of course, when we think of a lie, we think of intentional deception... And I--this--this child, I--I don't really believe has a conception of the truth and untruth."
>
> P. 1082 Line 2 THE COURT: All right counsel, Cases under the Evidence Code indicate the Court has wide discretion. Considering the child's overall demeanor and considering the fact that the child did not appear to be coached, considering his grades in school, I think that this child is an intelligent child, and I think considering his age, I certainly think he's competent to testify, and I will so rule at this time, noting error being assigned by both counsel.

Several persons thought they observed Zachary communicating with someone in the audience while testifying. Mr. Evens, one of Gail's attorneys and observers in the court room also though Zachary was communicating with someone in the courtroom.

It's bad enough that Zachary, with his diminished capacity to understand and testify was allowed to testify without the jury having the benefit of the psychological reports; Zachary was coached by someone in the audience. This type of activity takes the fair out of "fair and impartial trial."

REFUSAL TO SEVER – DENIAL OF DUE PROCESS

Due to the conflicting nature of Willars' and Crandall's

defense, it was error not to sever the trials of Willars and Crandall. Gail Willars was Crandall's defense and James Crandall was Willars' defense. The fact that Willars' child was in Chicago under the care of Crandall's friends is sufficient to demonstrate that something might be amiss. To extricate herself, Gail had to incriminate Crandall. Gail was limited on testimony she could give concerning Crandall's character. Character evidence (particularly evidence concerning Crandall's violent nature and his control over people) was essential to her defense and could have been presented had they not been tried together.

La. C.Cr.P Art. 704 Severance[xii]

> "Jointly indicted defendants shall be tried jointly unless:
> (1) The state elects to try them separately, or
>
> (2)The court, on motion of defendant, and after contradictory hearing with the district attorney is satisfied that justice requires a severance.

Normally co-defendants are tried together; however, circumstances often exist where it is essential that defendants be tried separately. The various cases refer to severances being necessary when the defendants have mutually antagonistic defenses. This would cause the defendant to defend the charges brought by the state and the charges brought by the co-defendant.

As always, the need for severance depends on the facts of each case. State v. Prudholm[xiii], 446 So. 2d 729 (La. 19__???), State v. Turner, 365 So. 2d 1352 (La. 19__)

What unique facts would lead us to believe that a severance is mandated?

The minutes of the court reflect the following:

1. 4/11/90 Defendant Willars is in open court with Counsel Robert Raley, Motion is called. State will not sever cases and will not call case for trial Monday, April 16, 1990. Case is continued to be reset by notice. (Kitchens)

2. Honorable Judge Harmon Drew later ruled

   page 9, line 13 THE COURT...Then just for clarity, Madam Clerk, on the Motion in Limine filed on behalf of Mr. Crandall today, while I am instructing Mr. Raley not to seek to elicit testimony from his client merely for the purpose of showing the alleged bad character of Mr. Crandall, I will allow him to elicit the testimony from his client in explaining her situation and explaining her side of the case. So I will deny the request to limit the testimony extended by Mr. Stinson. I'll note that he assigns error to the Court's ruling. And my reasons for my ruling are--contained in the short memo that's attached to the outside of the envelope. And for one thing, the remedy in a situation like this normally would be a severance. Short of a severance, which I don't think either defendant wants, short of a severance, I don't know what else to do but allow her to tell the story. And I will give--the appropriate limiting and cautionary instructions later..."

3. Willars requested a written Motion to Sever be filed by her attorney because she felt that Crandall through Alders was controlling her son Zachary, forcing her into a

> position where Crandall could control the trial and create a self-defense strategy. The self-defense strategy concerning Crandall was ludicrous and any jury who observed Crandall so posturing could only believe that Willars willingly followed this trial strategy.

Here, the decision of Judge Kitchens not to sever and the ruling that short of severance, this problem could not be cured resulted in a decision which was exercised arbitrarily or to the prejudice of the accused State vs. McGraw,[xiv] 366 So. 2d 1278 (La. 1978) at 1283. The decision not to severe, the trial denied Willars the opportunity to present critical evidence in her defense.

The actual prejudice standard requires defendant to shoe that he/she would probably not have been convicted had he/she been accorded a separate trial. McGraw, 366 So. 2d at 1283. Evidence in this case comes from: the incompetent Zachary, the coroner who states there was a struggle and conflicts with Zachary, and evidence at the scene which conflicts with Zachary. If we believe the only evidence which was admitted without objection, which is the letters from Crandall, that Willars had nothing to do with killing of Parr; the inescapable conclusion is that Crandall intentionally killed Parr by bludgeoning him to death with a frying pan.

If we believe the letters from Crandall, the coroner,

Willars and the evidence that the property of Parr was "in the car" actual prejudice is a foregone conclusion. Had Crandall been tried first, his 5th amendment privileges would have been lost and Crandall would have been forced to testify in accordance with the letters. Interestingly, the letters were admitted for the truth contained therein without objection.

SPEEDY TRIAL

Willars was denied her right to a Speedy Trial. One of the reasons Willars sough a severance is because the trial was constantly being continued due to the actions of James Crandall. Essentially, her case was put on hold while Robert Raley and Jim Bullers ran for office. Jim Bullars ran for District Attorney and Robert Raley ran for judge on a "get tough on crime campaign."

The two bases for defendants right to a speedy trial are contained in La.C.Cr.P. art 701 and the Sixth Amendment to the United States Constitution and Article 1, Section 16 of the Louisiana Constitution of 1974. The two are not equivalent. State v. Beauchamp, 510 So. 2d 22 (La. App. 1st Cir 1987[xv]) writ denied. 512 So. 2d 1176 (La. 1987); State v. Sosa[xvi], 446 So. 2d 429 (La. App 4th Cir 1984), writ denied 469 U.S. 866, 105 S. Ct. 209, 83 L. Ed 2d 140 (1984)

La. C.Cr.P. 701 does not bar prosecution but merely authorizes pre-trial relief. Once a defendant has been tried and convicted, any allegation of violation of C.Cr. P art 701 raised after trial is moot. State v. Jones[xvii], 516 So2d 396 (La. App 5th Cir 1987), appeal after remand, 537 So2d 848 (La. App 5th Cir 1989); State v. Johnston[xviii], 480 So2d 823 (La. App 2d Cir 1985). Any claim to a 701 violation would have no merit. A claim to ineffective counsel would have merit, because failure to file a written motion deprived Willars of her rights under Art. 701.

CONSTITUTIONAL RIGHT:

The Constitutional right to a speedy trial is not dependent upon a motion, but rather, attaches when an individual becomes an accused, either by formal indictment or bill of information, or by arrest and actual restraint. State v. Pleasant[xix], 489 So2d 1005 (La App 1st Cir 1986), writ denied, 493 So.2d 1218 (La. 1986). Three considerations underlie the right to a speedy trial:

(1) prevention of undue and oppressive incarceration prior to trial.

(2) minimization of anxiety and concern accompanying public accusation, and

(3) the possibility that long delay would impair the ability of an accused to defend himself. The

> factor of anxiety of the accused refers to a presumptively innocent defendant who must live under a cloud of suspicion until he has an opportunity to establish his innocence. State v. Johnson, supra, at 824; State v. Johnson 463 So2d 458 (La. 1978).

Speedy trial claims are evaluated under the four-factor test enunciated in Barker v. Wingo[xx], 407 U.S. 514, 92 S.Ct., 2182, 33 L.Ed 2d 101 (1972). The considerations in determining whether a defendant has been deprived of a speedy trial are length of the delay, reasons for delay, defendant's assertion of his right and actual prejudice to defendant.

If the delay is presumptively prejudicial, there will be an inquiry into the other factors. The peculiar circumstances of the case will determine the weight to be ascribed to the length of the delay and the reason for the delay. State v. Beauchamp[xxi], supra at 28, cited in State of Louisiana v. Walter Cowger[xxii], No. 90-KA-715 Court of Appeal of Louisiana, Fifth Circuit March 13, 1991.

The state did not diligently or in good faith afford this defendant a speedy trial.

The denial of Gail Willars' right to a speedy trial very well could have cost her freedom. Zachary was only eight when the death occurred and nearly ten when he testified at trial. Nearly

two years is enough time for the child to have forgotten many of the details which would have cleared Ms. Willars. Additionally, Zachary was living with people who were benefiting financially by Willars remaining incarcerated. They were receiving $1,000.00 per month to care for Zachary. They had two years to poison Zachary against his mother. Why did Zachary stay with these people rather than his own family? Willars' attorney's failure to file a formal Motion for Speedy Trial was a very critical error.

FAIR AND IMPARTIAL JURY
IMPROPER/INADEQUATE JURY INSTRUCTIONS

An improperly instructed jury cannot apply the law to the facts and is thus by any standards not fair and impartial.

Jury instructions were in error.

a. No explanation as to burden of proof in cases based on circumstantial evidence were given.

b. The jury instructions were very confusing as to the issue of manslaughter.

Judge Drew's jury instructions created a problem. Robbery under La. R.S. 14:64 & 64.1 is defined as follows:

> "...robbery is the taking of anything of value belonging to another from the person of another or that is in the

immediate control of another, by use of force or intimidation..."

Robbery is a specific intent crime.

Dead men don't own anything. The old adage that you can't take it with you is true. Seizen occurs at the moment of death. Any property which Par owned devolves to his heirs at the time of his death.

You can't use force or intimidation on a dead man. The jury should have been instructed that "Timing is everything" If you find as a matter of fact there was no intent to rob Charles Parr while Charles Parr was alive, you cannot find that James Crandall and Gail Willars were involved in the commission of a robbery. The killing of Charles Parr would still be a crime; but that crime would be of a lesser degree than first and second degree murder. It is a separate crime.

The United States Court of Appeal, 5th Circuit, in Humphrey, III vs. Cain, 102 F.2d 526, 183 F.3d 552(5th Cir. La.) Apr 03, 1998), certiorari denied ___ S.Ct.____, 1998 WL 480119, 67 USLW, 3253, 67 USLW 3257, 67 USLW 3258 (U.S. Oct. 13, 1998) NO 98-5596), reversed a State Court conviction on appeal

from a Petition for Writ of Habeas Corpus because of improper jury instructions.

The court in banc stated:

> "We took this case en banc to resolve conflicting panel decisions whether Cage-Victor error fits within the second Teague exception, making it available in federal habeas to a state prisoner whose criminal conviction was final when those cases were decided. We overrule all prior decisions of this court holding to the contrary. For the reasons stated in the panel opinion, we hold that the jury instructions defining reasonable doubt lowered the State's burden of proof below the constitutional minimum. We reverse the district court's judgment denying the writ of Habeas corpus and remand the case to the district court with instructions to order the State of Louisiana to either try Elmo Humphrey, III again or release him from custody within 90 days of the date of the district court's order on remand."

The court concluded:

> "the reasonable doubt instruction did not give the defendant the benefit of reasonable doubt as elucidated by the Supreme Court In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed 2d 368(1970), Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed 2d 339 (1990) (per curiam) and Victor v. Nebraska 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed. 583 (1994).

The 5th Circuit panel commented on the fact that Humphry case was a close and difficult case. The court also commented:

> "Of course, a case need not be close in order for us to find reversible error in the reasonable-doubt instruction. But, Humphrey's is a close case nevertheless and makes clear the importance of affording defendants the right

> established in Cage and reinforced in Victor. This is not to suggest treat Humphrey's conviction was not supported by sufficient evidence; only that evidence was meager and the conviction unpredictable."

Failure of the trial court in the Willars case to go into the standard of review when the case is a circumstantial evidence case was a defect in the "reasonable doubt" instructions as it affected Gail Willars.

Like the Humphrey case, the Willars case was very weak; in fact it is Willars conviction that there was insufficient evidence to convict Willars of 2nd Degree Murder.

James Crandall killed Parr. James Crandall had the intent to kill or inflict great bodily harm on Parr. There is no evidence to reflect that Gail Willars had any intent to kill or inflict great bodily harm on Parr. Crandall's intent cannot be imputed to Willars.

PROSECUTION'S IMPROPER COMMENT ON THE EVIDENCE DENIAL OF RIGHT TO CONFRONTATION

It was error for the District Attorney to comment on evidence which had not been introduced as evidence in his closing arguments. There was a remark about the fight and the unlikelihood of Crandall subduing Parr by himself. Crandall

weighed 280 pounds and was 6'3" tall, but by the time the case went to trial, Crandall was down to 195 pounds, thin, tired and tried to commit suicide many ties. The jury had the impression that at the time of Parr's death, Crandall was thin and weak, when in fact he was strong and weighed 280 pounds and was a better than even match for Parr.

Below are excerpts from the prosecution's closing statements, the last words the jury hears before deliberations.

page 1442, line 5

> "You have to remember that for the -- especially the victim, and there are two victims in this. I agree with Mr. Raley. I disagree with whom they were. Certainly it was a time of terror on Mr. Parr, who lost his life. Of course the other victim in this case was Zachary, not his mother, but Zachary who had to be exposed to this. That was a brave youngster that testified in front of you."

Page 1448, line 23

> "If she worried about Zack, why didn't she tell them to call the police right then? That was her time to get out of it. If that was a big mistake that's where you get out of it. As long as she keeps--she blames this all on Zack. That's a most horrible deplorable thing that I have seen in this case. That poor child victimized by his mother.

page 1453, line 5

> "If she cared anything about Zachary, she would have left him in Houston. She only cares about herself. Look what she put that poor boy through."

page 1453, line 14

"The only thing the defendant can dispute is what happened in the room, because everything else is locked in. So that's why I sat that's the key, what was the intent. Don't be fooled. Don't get the wool pulled over your eyes by her up here crying through this testimony. It was touching at first. She could keep questions about minor things here and there and she could keep crying. Where was her concern for Zachary back there. All this concern and emotion now? Where was it when she was taking that poor little boy around in these sleazy motels with James Crandall? She wants you to feel sorry for her now? What about Zachary?

Page 1455, line 7

"She didn't want to do a dog gone thing but get away from there with Crandall. That's all she ever wanted. She didn't care about Zachary. If she would have cared about Zack, she would have left him in Houston.

Page 1455, line 32

"She could have saved a man's life. She chose not to and used her son; blames it on him. Oh! I was worried about him.

La. Code of Criminal Procedure Art. 774 deals with the scope of argument.

"The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.

The argument shall not appeal to prejudice.

The state's rebuttal shall be confined to answering the argument of the defendant."

SUFFICIENCY OF EVIDENCE

Except for testimony of Zachary Willars and possibly the testimony of Ms. Alders which was suppressed by the court, there was no evidence or testimony to rebut Willars testimony that she did not kill Charles Parr and that she had intended to commit prostitution, not robbery or armed robbery. The jury in the Willars case was mislead when the judge decided that Zachary was competent to testify. The credibility determination of the jury was tainted. The jury had no knowledge of Zachary's mental or psychological problems. They saw Zachary as a cute, very bright and very "brave" little boy who only knew how to tell the truth. This conviction is based upon testimony from an incompetent child witness. With that taint, the decision of the jury is not reliable.

Even viewing the evidence in light most favorable to the prosecution, any rational trier of fact could find essential elements of the crime (WERE NOT) proven by a reasonable doubt." State ex rel Graffagnino v. King, 436 So2d 559 (La. 1983) Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979) legislatively embodied at LSA-C.Cr.P. Art 821. This standard is applicable in cases involving both direct and circumstantial

evidence. State v. Smith, 441 So. 2d 739 (La. 1983); State v. Perry, 612 So.2d 986 (La. App.2d Cir 1983).

The fact that Willars helped clean up the mess and ran off with Crandall does not prove beyond a reasonable doubt that Willars intended to inflict great bodily harm on Parr or kill Parr. It also does not prove that Willars intended to commit Robbery or Armed Robbery. It coincides with the belief that Gail had that her son was in danger. When she went to the motel clerk to check out, Zachary was not with her. It was very reasonable to believe that if she made any mistakes whatsoever, the life of her son was in danger.

The prosecution also argued that Willars inaction in not reporting the crime may have caused Parr's death. 2nd Degree murder is a specific intent crime and lack of action is not enough to support a conviction of second degree murder. Gail truly believed that Parr was already dead and there was nothing she could do to help him.

Letters from Crandall, the co-defendant were admitted into evidence without objection for the truth of the assertions contained therein. This evidence when viewed in the draconian light shown from Jackson v. Virginia, supra, shows Willars'

absolute innocence of the crime of murder, placing the guilt solely on Crandall; the letter was statements against interests of Crandall, making them even more reliable.

In a civil action, uncontroverted evidence is to be taken at face value. Politz v. Recreational and Parks Commission, 92 CA0388, (La.App.1 Cir, 4/23/93, rehearing denied 6/28/93, p. 1095)

> "Although a plaintiff is entitled to no special inference in his favor, uncontroverted testimony should be taken as true to establish a fact for which it is offered absent circumstances in the record casting suspicion on the reliability of the testimony and sound reason for its rejection."

The evidence and facts established at trial establish that Willars may be guilty of Attempted Prostitution, but she was not guilty of murder.

CONCLUSION

All errors argued deal with Erroneous Interpretation or application of Constitutional laws and/or Gross Departure from proper Judicial Proceedings. Even given the more stringent requirements for Habeas Corpus review of State Court decisions that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme

Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court.

Gail Willars is sentenced to serve the rest of her life in prison. If ever there was a case begging for review by this court, the Willars case is one.

S/ARAX RENEE BRUMFIELD

ARAX "RENEE" BRUMFIELD
Attorney at Law
La. Bar No. 03594
P. O. Box 4108
Baton Rouge, Louisiana 70821
(225) 292-6151

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-31043
USDC No. 97-CV-693

U.S. COURT OF APPEALS
FILED
APR 0 6 1999
CHARLES R. FUGEWILLARS,

GAIL S. WILLARS

Applicant-Appellant,

versus

WARDEN LOUISIANA CORRECTIONAL INSTITUTE WOMEN,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ORDER:

Gail Sue Willars, a state prisoner, has given notice of her appeal from the district court's order dismissing her application for a writ of habeas corpus. Before Willars may proceed with her appeal, she must obtain a certificate of appealability ("COA") from a judge of this court. 28 U.S.C. § 2253(c) (1) (A). COA will be granted only if Willars makes a substantial showing of the denial of a federal right. 28 U.S.C. § 2253(c)(2).

Willars contends: (1) that she received ineffective

assistance of counsel; (2) that her confrontation rights were denied; (3) that her trial should have been severed from that of her codefendant; (4) that she was denied her right to a speedy

trial; (5) that the jury instructions deprived her of a fair trial; (6) that remarks by the prosecutor deprived her of a fair trial; and (7) that the evidence was insufficient to convict her of second degree murder.

Willars has failed to make a substantial showing of the denial of a constitutional right as to her second, fourth, fifth, and sixth issues. Willars has failed to show that the district court erred in holding that the state appellate court's resolution of her first and seventh issues was not contrary to and did not involve an unreasonable application of clearly established Federal law. See 28 U.S.C. § 2254(d) (1); see also Murphy v. Johnson, 110 F.3d 10, 11 (1997). Willars has failed to show that the district court erred in holding that her third issue is subject to an independent and adequate state procedural bar. See Coleman v. Thompson, 501 U.S. 722, 729 (1991); see also Murphy, 110 F.3d at 11. COA is

DENIED.

s/ Patrick Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO . 98-31043
USDC No. 97-CV-693

GAIL S. WILLARS,

Petitioner-Appellant,

versus

WARDEN LOUISIANA CORRECTIONAL INSTITUTE WOMEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

Before HIGGINBOTHAM, JONES and DENNIS, Circuit Judges.

BY THE COURT:

Gail Sue Willars, a state prisoner, has moved for panel review of Judge Higginbotham's order denying her request for a certificate of appealability ("COA") for an appeal from the dismissal of her application for a writ of habeas corpus. "The court may review the action of a single judge." Fed. R. App. P. 27(c) .

In the instant motion, Willars merely lists her issues and concludes that she has satisfied the standard for issuance of a

COA. Willard contends that Judge Higginbotham erred in citing Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997). Murphy was

cited because it provides the standard for this court's review of nonconstitutional issues in the context of a COA application.

Willars argues that she was convicted on the basis a constitutionally flawed trial and that the evidence against her was "flimsy at best." "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Although Willars had a plausible jury argument, the jury convicted her for second-degree murder. The evidence against her could be characterized as substantial. See State v. Willars, 661 So. 2d 673, 677-78 (La. App. 1995). Willars has failed to show that Judge Higginbotham's order should be vacated. The motion for panel review is DENIED

Filed July 12, 1999